

No. 12442

United States
Court of Appeals
for the Ninth Circuit.

JOHN I. HAAS, INC., a corporation,
Appellant,
vs.

O. L. WELLMAN,
Appellee.

Transcript of Record

Appeal from the United States District Court,
for the District of Oregon.

FILED

MAR 9 - 1950

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

ROBERT M. KERR,

STUART W. HILL,

Equitable Building,
Portland 4, Oregon,
for appellant.

MAGUIRE, SHIELDS, MORRISON and
BAILEY,

ROY F. SHIELDS,

WILLIAM E. DAUGHERTY,

RANDALL B. KESTER,

723 Pittock Block,
Portland, Oregon,
for appellee.

In the District Court of the United States
for the District of Oregon

Civil Action No. 4158

O. L. WELLMAN,

Plaintiff,

vs.

JOHN I. HAAS, INC.,

Defendant.

COMPLAINT

Now comes plaintiff and for his complaint alleges:

I.

Plaintiff is a citizen of the State of Oregon and defendant is a corporation incorporated under the laws of the State of Delaware. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars.

II.

On or about February 7, 1944, plaintiff and defendant entered into a contract by which, as subsequently modified, it was agreed that plaintiff would sell, and defendant would buy, one-half of the saleable crop of late cluster hops grown by plaintiff on a certain farm in Clackamas County, Oregon, during the 1947 hop season; that said hops were to be delivered when ready for delivery in a designated warehouse at Mt. Angel, Oregon, and

that upon such delivery defendant would pay for said hops the "growers market price" to be determined in the manner specified in said contract.

III.

Plaintiff duly performed all of the terms and conditions of said contract on his part to be performed, and delivered said hops (which weighed 37,650 pounds net) in said warehouse. Said hops were received, inspected and weighed in by defendant in said warehouse on September 25, 1947, and plaintiff obtained a warehouse receipt therefor. The "growers market price" for said hops determined in the manner specified by said agreement was eighty-five cents per pound, or a total of \$32,002.50. Plaintiff duly tendered possession of said hops to defendant conditioned that defendant at the time of taking such possession pay to plaintiff the purchase price of said hops. The defendant refused to pay said purchase price, or any part thereof, and said hops remained in said warehouse until disposed of as hereinafter alleged. Hops are of a perishable nature and begin to deteriorate shortly after they are harvested.

IV.

Due to an over production of hops during the 1947 season, general market prices of hops began a downward trend toward the end of September, 1947, and thereafter declined rapidly until they reached a level of less than one-half of the "growers market price" provided for in said contract. With-

out rejecting said hops defendant advised plaintiff in October, 1947, that it did not wish to take said hops; and at that time, and from time to time thereafter defendant suggested that plaintiff try to find some other buyer for said hops. The parties from time to time negotiated with respect to the disposition of said hops until on or about May 3, 1948, when defendant finally renounced all liability under said contract. On or about May 7, 1948, and after defendant had been in default in the payment of said sale price an unreasonable time, plaintiff, after notice to defendant and without waiving his rights against defendant, sold said hops to another buyer at a price of \$11,904.31, which was the best price obtainable therefor.

V.

After crediting said resale price of \$11,904.31 on said contract price of \$32,002.50 there remains due and owing to the plaintiff the sum of \$20,098.19 which the defendant wrongfully refuses to pay.

Wherefore plaintiff demands judgment against defendant for the sum of \$20,098.19, interest, and costs.

/s/ ROY F. SHIELDS,

/s/ WILLIAM E. DAUGHERTY,

Attorneys for Plaintiff.

MAGUIRE, SHIELDS, MORRISON & BAILEY,
of Counsel.

[Endorsed]: Filed July 9, 1948.

[Title of District Court and Cause.]

MOTION FOR MORE DEFINITE STATEMENT

The defendant moves the Court for an order requiring the plaintiff to make a more definite statement of the matters set forth in paragraph II of the complaint now on file herein, in the following respects:

(a) The terms and provisions of the contract entered into on or about February 7, 1944.

(b) The date on which said contract was "subsequently modified."

(c) The manner in which said contract was so modified.

(d) The terms and provisions of said modification.

KERR & HILL,
/s/ ROBERT M. KERR,
/s/ STUART W. HILL,
Attorneys for Defendant.

NOTICE OF MOTION

To: Roy F. Shields, William E. Dougherty, Attorneys for Plaintiff.

Please take notice that the undersigned will bring the foregoing motion on for hearing before the above-entitled Court on the 16th day of August, 1948, at 10 o'clock A.M., or as soon thereafter as counsel may be heard.

/s/ ROBERT M. KERR,
Of Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed Aug. 2, 1948.

[Title of District Court and Cause.]

AMENDED ANSWER

For answer to the complaint of the plaintiff in the above-entitled cause, the defendant says:

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

Defendant admits the allegations in Paragraph I, and denies each and every other allegation in said complaint contained.

Third Defense

The defendant avers that it did not accept the said hops at the time tenth bale samples were taken or at any other time, but the defendant alleges that if it can be said that it did accept said hops, the defendant is not liable to the plaintiff for the price of the hops for the reason that the defendant rejected said hops within a reasonable time after it first had an opportunity to make a reasonable inspection of said hops, and for the further reason that such rejection was justified inasmuch as the said hops were not of the quality specified in the said contract between the plaintiff and the defendant, but were of such an inferior quality that the defendant was not bound to accept them.

Wherefore defendant prays judgment that the complaint of plaintiff be dismissed, and for defendant's costs.

/s/ KERR & HILL,
/s/ ROBERT M. KERR,
/s/ STUART W. HILL,
Attorneys for defendant.

United States of America,
District of Oregon—ss.

I, Stuart W. Hill, being first duly sworn, depose and say: That I am one of the attorneys for the defendant in the above-entitled cause; that I have read the foregoing Amended Answer and believe it to be true; that said defendant is absent from and a non-resident of the District of Oregon in which said cause is pending, and that I make this affidavit for that reason.

s/ STUART W. HILL.

Subscribed and sworn to before me this 1st day of February, 1949.

[Seal] /s/ R. M. KERR,
Notary Public for Oregon.

My Commission expires: 2/5/51.
State of Oregon,
County of Multnomah—ss.

I hereby certify that I have prepared the foregoing copy of Amended Answer and have carefully compared the same with the original thereof; and that it is a correct copy therefrom and of the whole thereof.

That the said Amended Answer in my opinion is well founded in law.

Dated, 1949.

.
Of Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed Feb. 2, 1949.

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

I find that the buyer weighed the hops and “took them in,” without imposing any conditions. By the custom of the trade, this constituted acceptance and makes the buyer liable for the contract price.

Dated June 15, 1949.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed June 15, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action was tried at Portland, Oregon, before the undersigned Judge of the above-entitled Court. Plaintiff appeared in person and by Randall B. Kester and William E. Dougherty of his attorneys,

and defendant appeared by Robert M. Kerr and Stuart W. Hill, its attorneys. Both parties waived jury trial, and the issues were tried by the Court.

It appearing that this action involved common questions of law and fact with the actions of Fred Geschwill, plaintiff, vs. Hugo V. Loewi, Inc., defendant, Civil Action No. 4082, and Kilian W. Smith, plaintiff, vs. Hugo V. Loewi, Inc., defendant, Civil Action 4083, the parties consented and the Court ordered that said three actions be tried jointly and that the evidence in any of the actions should be deemed to have been taken and heard and should be considered in each of the actions so tried together to the extent that such evidence was pertinent, material and relevant.

The joint trial of the three actions began on January 25, 1949, and concluded on February 5, 1949. All parties to said actions offered evidence. The Court heard arguments of counsel for the respective parties, and the Court considered memorandum briefs on the facts and the law submitted by counsel for the respective parties.

The Court, being fully advised, having considered the evidence, arguments and briefs, and having handed down his memorandum of decision, now hereby makes the following

Findings of Fact:

1. At the time of the commencement of this action and at all times herein mentioned plaintiff was and is a citizen of the State of Oregon and

defendant was and is a corporation incorporated and existing under the laws of, and a citizen of, the State of Delaware.

2. The amount in controversy herein exceeds, exclusive of interest and costs, the sum of \$3,000; and this Court has jurisdiction of the subject matter, the parties and the cause of action.

3. On or about February 7, 1944, plaintiff, as seller, and defendant, as buyer, entered into the 1947 "hop contract" received in evidence herein, which contract was one of a series of similar contracts entered into between the parties at the same time relating to hop crops for several successive years. By said contract it was agreed that plaintiff would sell and defendant would buy one-half of the salable crop of fuggle and late cluster hops grown by plaintiff on a certain farm in Clackamas County, Oregon, in 1947. There is no controversy here concerning the fuggle hops which were in 1947 grown by plaintiff and accepted by defendant. The one-half of the 1947 crop of late cluster hops involved here was duly grown and raised by plaintiff on said farm.

4. By said contract defendant buyer agreed to advance to plaintiff seller, as part payment under the contract, certain sums on certain dates, and the contract provided that defendant should have a prior lien upon said hop crop for such advances. Pursuant to said contract, defendant caused plaintiff to execute and deliver to defendant a separate chat-

tel mortgage upon said 1947 hop crop, and defendant duly filed said chattel mortgage in the records of Clackamas County, Oregon. Defendant did not at any time release or discharge said mortgage of record.

5. Said contract provided in substance that if said growing crop at or before the time of picking was not in condition to produce the quality of hops called for by the contract, then the defendant buyer would have been released from its obligation to make any further advance under the contract. In 1947 there was, and defendant knew there was, widespread mildew in hop yards in the Willamette Valley in Oregon. Before and at the time of picking defendant knew that there was mildew in plaintiff's said late cluster hops and that said hops when picked and baled would in normal course show such mildew. Defendant, having such knowledge, elected to make plaintiff a further advance payment to enable plaintiff to harvest said late cluster hops. Such mildew in said late cluster hops did not thereafter become more pronounced or prevalent.

6. Defendant buyer made advance payments under the contract in a total amount which differed from that called for by the contract but which was agreed upon by the parties. Defendant reimbursed itself for all advance payments made under said contract, with respect to both the fuggle and the late cluster hops, by deducting the total of said advance payments from the amount due plaintiff for

the fuggle hops purchased by defendant from plaintiff under said 1947 contract.

7. Plaintiff duly raised, harvested, cured and baled said crop of 1947 late cluster hops, and in accordance with said contract delivered the same in warehouse at Mt. Angel, Oregon. The time and place of such delivery was acceptable to defendant and was in accordance with the prior practice of the parties. On September 25, 1947, at said warehouse defendant caused one-half of said 1947 crop of late cluster hops to be segregated in a manner which was acceptable to defendant and which was in conformance with the prior practice of the parties. At that time the bales of hops which constituted said one-half of said crop of 1947 late cluster hops were received, inspected, sampled, marked and weighed by defendant, and were identified, appropriated to the contract and set aside. Plaintiff duly performed all of the terms and conditions of said contract on his part to be performed.

8. At the time said contract was entered into, and at the time of the delivery and weighing in of the late cluster hops as aforesaid, it was an established usage and custom in the hop trade in Oregon, which was known to the parties hereto, that such weighing in of hops by the buyer following such an inspection constituted an acceptance of such hops. The parties did not agreed upon any change in or deviation from, and plaintiff did not waive, said established custom and usage. Defendant in fact

accepted said one-half of the 1947 crop of late cluster hops produced by plaintiff as aforesaid, and defendant was obligated to pay the contract price therefor on or before October 31, 1947, but defendant did not then or thereafter pay said price or any part thereof.

9. There was no Federal price regulation in effect covering the 1947 crop of Oregon hops, and the price to be paid by the defendant buyer for said late cluster hops under said contract was the grower market price for such Oregon hops on the particular date selected by the plaintiff seller between the dates specified in said contract. The grower market price for such hops in September and October of 1947 was 85 cents a pound. Said grower market price of 85 cents a pound for said late cluster hops was selected by plaintiff and communicated to defendant in a manner and at a time which was acceptable to defendant and which conformed to the prior practice between the parties.

10. The leaf and stem content of said late cluster hops was eleven per cent or three per cent more than the average of eight per cent recognized in the hop trade in Oregon in 1947. According to the general custom and usage of the trade that year, which was known to the parties, such leaf and stem content was compensated for, and the grower market price was computed, by deducting one cent per pound for each one per cent that the leaf and stem content exceeded eight per cent. The parties desig-

nated the grower market price pursuant to said contract at 85 cents per pound without reference to leaf and stem content.

11. The grower market price for said hops under said contract was 85 cents per pound net weight, less 3 cents per pound deduction for leaf and stem content as aforesaid. Said hops weighed 37,638 pounds net, as determined by defendant. The contract price for said hops was 82 cents per pound, or a total of \$30,863.16.

12. Plaintiff duly tendered said late cluster hops to defendant in warehouse at the place specified in said contract, and plaintiff was at all times ready, able and willing to give complete possession of said hops to defendant in exchange for the price. Defendant did not pay said purchase price or any part thereof. (Defendant reimbursed itself for the partial advance payment out of the fuggle proceeds, as aforesaid.) Said hops, as defendant knew, continued to be held by the warehouseman until disposed of as hereinafter stated. Defendant at all times knew it could obtain said hops upon payment of said purchase price.

13. When the hops were tendered to defendant and defendant had inspected the same as aforesaid, and subsequently when defendant advised plaintiff that it did not wish to take said hops as hereinafter stated, defendant did not specify any particular objection it may have had to said hops. Upon trial defendant advanced the two specific ob-

jections that said hops showed some mildew and were somewhat above average in leaf and stem content. Upon the facts neither claimed defect was material.

14. Plaintiff delivered the very hops which were covered by the contract and upon which defendant had made advance payments. Said hops were of substantially the average quality of such Oregon late cluster hops actually accepted in 1947 both by the hop trade generally and by defendant under contracts containing in effect the same provisions as to quality. Defendant did not rely upon any warranty or representation, whether contained in the contract or otherwise, that said hops would be any different in condition or quality than said hops actually were when tendered and delivered. Said hops upon tender and delivery as aforesaid substantially conformed to the quality provisions of said contract.

15. Without rejecting said late cluster hops defendant advised plaintiff in October, 1947, that it did not wish to take said hops; and from time to time thereafter defendant suggested that said hops be sold to some other buyer. The parties hereto from time to time negotiated with respect to the disposition of said hops until on or about May 3, 1948, when defendant finally renounced all liability under said contract.

16. Hops are of a perishable nature; there had been a material decline in the general market price

and demand for 1947 Oregon late cluster hops; and the hops here involved could not readily be resold. On May 7, 1948, after defendant had been in default in the payment of said price an unreasonable time, plaintiff after notice to defendant and without waiving his rights against defendant, sold said hops to another buyer at a total price of \$11,904.31, which was the best price then obtainable therefor. Defendant consented to such resale. Said resale price was properly credited against the sum then due from defendant, and the balance remaining due was as follows:

Amount due from defendant on October 31, 1947.....	\$30,863.16
Interest thereon to May 7, 1948, at 6% per annum.....	956.25

Amount due on May 7, 1948.....	\$31,819.41
Proceeds of resale on May 7, 1948...	11,904.31

Balance	\$19,915.10
---------------	-------------

No part of said balance has been paid.

Upon the foregoing findings of fact the Court has determined and does hereby make the following:

Conclusions of Law

1. Plaintiff substantially performed all of the terms and conditions of the contract between the parties on his part to be performed.

2. The property in said late cluster hops passed to defendant.

3. Defendant became obligated to pay to plain-

tiff on or before October 31, 1947, the sum of \$30,-863.16.

4. Defendant wrongfully refused to and did not perform its obligation under said contract.

5. The resale of said late cluster hops was proper, and the proceeds therefrom received by plaintiff are properly credited against the amount then due him from defendant.

6. The measure of plaintiff's recovery upon the facts here is, under Oregon law, the difference between the amount due under said contract and the amount realized from said resale.

7. Plaintiff should have judgment against defendant for \$19,915.10, with interest at the rate of six per cent per annum from May 7, 1948, until the same be paid in full, and with costs and disbursements; and judgment will be entered accordingly.

Dated this 22nd day of September, 1949.

/s/ CLAUDE McCOLLOCH,
Judge.

Proposed form submitted by

/s/ WILLIAM E. DAUGHERTY,
/s/ RANDALL B. KESTER,
of Attorneys for Plaintiff.

Service of proposed form admitted at Portland, Oregon, this 12th day of July, 1949.

KERR & HILL,
By /s/ GERALDINE RIST,
of Attorneys for Defendant.

[Endorsed]: Filed Sept. 22, 1949.

In the United States District Court
For the District of Oregon

Civil Action No. 4158

O. L. WELLMAN,

Plaintiff,

vs.

JOHN I. HAAS, INC.,

Defendant.

JUDGMENT

The Court having found the facts in this cause specially, stated separately its conclusions of law thereon, and directed the entry of this, the appropriate judgment, it is therefore

Considered, Ordered and Adjudged that plaintiff have and recover from the defendant the sum of \$19,915.10, with interest thereon at the rate of six per cent per annum from May 7, 1948, and plaintiff's costs herein taxed at \$164.63.

Dated this 30th day of September, 1949.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed Sept. 30, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that John I. Haas, Inc., a corporation, defendant above named, hereby appeals to the Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 30th day of September, 1949.

KERR & HILL,

/s/ ROBERT M. KERR,

/s/ STUART W. HILL,

Attorneys for Appellant.

[Endorsed]: Filed Oct. 10, 1949.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men By These Presents, that we, John I. Haas, Inc., a Delaware corporation, as principal, and Aetna Casualty & Surety Company, a Connecticut corporation, as surety, are held and firmly bound unto O. L. Wellman in the full and just sum of \$25,000.00, to be paid to the said O. L. Wellman or his certain attorney, executor, administrator, or assigns; to which payment, well and truly to be made, we bind ourselves, jointly and severally, by these presents.

Sealed with our seals and dated this 10th day of October, 1949.

Whereas, lately at a session of the District Court of the United States for the District of Oregon in a suit pending in said Court, between O. L. Wellman, as plaintiff, and John I. Haas, Inc., a Delaware corporation, as defendant, a judgment was rendered against the said defendant and the said defendant, John I. Haas, Inc., a Delaware corporation, having filed in said Court a notice of appeal to reverse the judgment in the aforesaid suit on appeal to the United States Court of Appeals for the Ninth Circuit, at a session of said Court of Appeals to be held at San Francisco, California.

Now, the condition of the above obligation is such that if the said defendant, John I. Haas, Inc., a Delaware corporation, shall prosecute its appeal to effect, and satisfy the judgment in full, together with costs, interest, and damages for delay, if for any reason the appeal is dismissed, or if the judgment is affirmed, and satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award if said John I. Haas, Inc., a Delaware corporation, fails to make its plea good, then the above

obligation to be void; else to remain in full force and virtue.

JOHN I. HAAS, INC.,
a Delaware corporation,

[Seal] By /s/ ROBERT M. KERR,
Its Attorney in Fact,
Principal.

AETNA CASUALTY &
SURETY CORPORATION,
A Connecticut Corporation.

[Seal] By /s/ JAMES H. COUCH,
Its Resident Vice President,
Surety.

Attest:

/s/ H. P. ATTERBURY,
Resident Ass't Secretary.

Countersigned:

/s/ H. A. PETERSON,
Resident Agent.

Form of bond and sufficiency of surety approved,
this 10th day of October, 1949.

/s/ CLAUDE McCOLLOGH,
U. S. District Judge.

Power of Attorney

Know All Men By These Presents, that John I. Haas, Inc., a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, has made, constituted, and appointed,

and by these presents does make, constitute, and appoint Robert M. Kerr, of Portland, in the State of Oregon, to be its true and lawful attorney, for it and in its name, place, and stead, to enter into, make, and execute, in an action pending in the District Court of the United States for the District of Oregon, entitled O. L. Wellman, plaintiff, v. John I. Haas, Inc., defendant, Civil Action No. 4158, a supersedeas bond, as principal, in the sum of \$25,000.00 or such other amount as may be necessary to comply with the order of the said Court fixing the amount of such bond, and to sign, seal, acknowledge, and deliver the same, in contemplation of an appeal from the judgment entered in said action on the 30th day of September, 1949.

In Witness Whereof, the said corporation has caused these presents to be signed by its officer thereunto duly authorized, and its corporate seal to be hereunto affixed, this 7th day of October, 1949.

JOHN I. HAAS, INC.,
[Corporate Seal]

By /s/ FREDERICK J. HAAS,
Its Vice President.

Attest:

/s/ WALTER RAUHN,
Secretary.

United States of America
District of Columbia—ss.

Personally appeared Frederick J. Haas, Vice President, of said corporation, signer and sealer of

the above instrument, he being thereunto duly authorized by the corporation above named, and acknowledged the same to be his free act and deed, and the free act and deed of said corporation before me, this 7th day of October, 1949.

[Seal] /s/ W. W. MATHEWS,
Notary Public, D. C.

My Commission Expires: 2/14/51.

The Aetna Casualty and Surety Company
Hartford, Connecticut

Certificate of
Authority of Resident Vice-President

Know All Men By These Presents, That James H. Couch with business address at Portland, Oregon, but without territorial restriction, has been and is hereby appointed Resident Vice-President of The Aetna Casualty and Surety Company, a corporation organized under the laws of the State of Connecticut, and having its principal office in the City of Hartford, State of Connecticut, and as such Resident Vice-President has full power and authority to sign and execute, on behalf of the Company, any and all bonds, recognizances, contracts of indemnity, or writings obligatory in the nature of a bond, recognizance, or conditional undertaking, and all bonds, recognizances, contracts of indemnity, or writings obligatory in the nature of a bond, recognizance, or conditional undertaking signed by him,

when sealed and attested by a Resident Assistant Secretary, shall be as valid and binding upon the Company as if the same had been signed by the President and duly sealed and attested.

This appointment is made under and by authority of the following provisions of the by-laws of the Company which provisions are now in full force and effect and are the only applicable provisions of said by-laws:

Article IV—Section 8. The President, any Vice-President, or any Secretary may from time to time appoint Resident Vice-Presidents, Resident Assistant Secretaries, Attorneys-in-Fact, and Agents to act for and on behalf of the Company and may give any such appointee such authority as his certificate of authority may prescribe to sign with the Company's name and seal with the Company's seal bonds, recognizances, contracts of indemnity, and other writings obligatory in the nature of a bond, recognizance, or conditional undertaking, and any of said officers or the Board of Directors may at any time remove any such appointee and revoke the power and authority given him.

Article IV—Section 10. Any bond, recognizance, contract of indemnity, or writing obligatory in the nature of a bond, recognizance, or conditional undertaking shall be valid and binding upon the Company when (a) signed by the

President or a Vice-President or by a Resident Vice-President, pursuant to the power prescribed in the certificate of authority of such Resident Vice-President, and duly attested and sealed with the Company's seal by a Secretary or Assistant Secretary or by a Resident Assistant Secretary, pursuant to the power prescribed in the certificate of authority of such Resident Assistant Secretary; or (b) duly executed (under seal, if required) by one or more Attorneys-in-Fact pursuant to the power prescribed in his or their certificate or certificates of authority.

In Witness Whereof, The Aetna Casualty and Surety Company has caused these presents to be signed by its Secretary, and its corporate seal to be hereto affixed, this 4th day of April, A.D., 1949.

THE AETNA CASUALTY AND
SURETY COMPANY,

[Seal] By /s/ J. A. SWEARINGEN,
Secretary.

State of Connecticut,
County of Hartford—ss.

On this 4th day of April, A.D., 1949, before me personally came J. A. Swearingen, to me known, who, being by me duly sworn, did depose and say: that he is Secretary of The Aetna Casualty and Surety Company, the corporation described in and which executed the above instrument; that he

knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by authority of his office under the by-laws of said corporation and that he signed his name thereto by like authority.

Certificate No. 379950.

[Seal] /s/ ANNE V. THORNE,
Notary Public.

My Commission Expires Mar. 31, 1952.

The Aetna Casualty and Surety Company
Hartford, Connecticut

Certificate of
Authority of Resident Assistant Secretary

Know All Men By These Presents, That H. P. Atterbury, with business address at Portland, Oregon, but without territorial restriction, has been and is hereby appointed Resident Assistant Secretary of The Aetna Casualty and Surety Company, a corporation organized under the laws of the State of Connecticut, and having its principal office in the City of Hartford, State of Connecticut, and as such Resident Assistant Secretary has power and authority to affix the seal of the Company to, and attest on behalf of the Company, any and all bonds, recognizances, contracts of indemnity, or writings obligatory in the nature of a bond, recognizance, or conditional undertaking, and all bonds, recognizances, contracts of indemnity, or writings oblig-

atory in the nature of a bond, recognizance, or conditional undertaking sealed and attested by him, when signed by a duly appointed Resident Vice-President, shall be as valid and binding upon the Company as if the same had been sealed and attested by the Secretary.

This appointment is made under and by authority of the following provisions of the by-laws of the Company which provisions are now in full force and effect and are the only applicable provisions of said by-laws:

Article IV—Section 8. The President, any Vice-President, or any Secretary may from time to time appoint Resident Vice-Presidents, Resident Assistant Secretaries, Attorneys-in-Fact, and Agents to act for and on behalf of the Company and may give any such appointee such authority as his certificate of authority may prescribe to sign with the Company's name and seal with the Company's seal bonds, recognizances, contracts of indemnity, and other writings obligatory in the nature of a bond, recognizance, or conditional undertaking, and any of said officers or the Board of Directors may at any time remove any such appointee and revoke the power and authority given him.

Article IV—Section 10. Any bond, recognizance, contract of indemnity, or writing obligatory in the nature of a bond, recognizance, or condi-

tional undertaking shall be valid and binding upon the Company when (a) signed by the President or a Vice-President or by a Resident Vice-President, pursuant to the power prescribed in the certificate of authority of such Resident Vice-President, and duly attested and sealed with the Company's seal by a Secretary or Assistant Secretary or by a Resident Assistant Secretary, pursuant to the power prescribed in the certificate of authority of such Resident Assistant Secretary; or (b) duly executed (under seal, if required) by one or more Attorneys-in-Fact pursuant to the power prescribed in his or their certificate or certificates of authority.

In Witness Whereof, The Aetna Casualty and Surety Company has caused these presents to be signed by its Secretary, and its corporate seal to be hereto affixed, this 4th day of April, A.D., 1949.

THE AETNA CASUALTY AND
SURETY COMPANY,

[Seal] By /s/ J. A. SWEARINGEN,
Secretary.

State of Connecticut,
County of Hartford—ss.

On this 4th day of April, A.D., 1949, before me personally came J. A. Swearingen, to me known, who, being by me duly sworn, did depose and say: that he is Secretary of The Aetna Casualty and

Surety Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by authority of his office under the by-laws of said corporation and that he signed his name thereto by like authority.

Certificate No. 379969.

[Seal] /s/ ANNE V. THORNE,
Notary Public.

My Commission Expires Mar. 31, 1952.

[Endorsed]: Filed Oct. 10, 1949.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD ON APPEAL AND DOCKETING
APPEAL

The Motion of the defendant for extension of time for filing record on appeal and docketing appeal having been brought on for hearing and it appearing to the court that the facts set forth therein are true, and the court being fully advised in the premises,

It Is Ordered that the time within which the record on appeal may be filed in the Court of Appeals and the appeal docketed in the Court of

Appeals be and the same hereby is extended to and including the 17th day of December, 1949.

Dated this 18th day of November, 1949.

/s/ CLAUDE McCOLLOCH,
U. S. District Judge.

[Endorsed]: Filed Nov. 21, 1949.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH
DEFENDANT INTENDS TO RELY ON
APPEAL

The defendant and appellant, John I. Haas, Inc., proposes on its appeal to the Court of Appeals for the Ninth Circuit to rely on the following points as error:

1. The court erred in finding that by the agreement of February 7, 1944, the plaintiff agreed to sell and the defendant agreed to buy one-half of the salable crop of cluster hops grown by the plaintiff on his premises in Clackamas County, Oregon, in 1947, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

2. The court erred in finding that before and at the time of picking, the defendant knew that there was mildew in the plaintiff's cluster hops and that said hops, when picked and baled, would in normal course show such mildew, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

3. The court erred in finding that the defendant, having such knowledge, elected to make plaintiff a further advance payment to enable the plaintiff to harvest said cluster hops, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

4. The court erred in finding that such mildew in said cluster hops did not thereafter become more pronounced or prevalent, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

5. The court erred in finding that the plaintiff duly raised, harvested, cured, and baled said crop of 1947 cluster hops, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

6. The court erred in finding that on September 25, 1947, the bales of hops which constituted the said one-half of the plaintiff's 1947 cluster hops were received, inspected, sampled, marked, and weighed by the defendant, and were identified, appropriated to the contract, and set aside, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

7. The court erred in finding that the plaintiff duly performed all of the terms and conditions of said contract on his part to be performed, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

8. The court erred in finding that at the time said contract was entered into and at the time of the delivery and weighing in of said cluster hops, there was an established usage and custom in the hop trade in Oregon, which was known to the parties hereto, that such weighing in of hops by the buyer following such an inspection constituted an acceptance of such hops, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

9. The court erred in finding that the parties did not agree upon any change in or deviation from, and the plaintiff did not waive, said established custom and usage, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

10. The court erred in finding that the defendant, in fact, accepted said one-half of the 1947 crop of cluster hops produced by the plaintiff, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

11. The court erred in finding that the defendant was obligated to pay the contract price therefor on or before October 31, 1947, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

12. The court erred in finding that the grower's market price for such hops in September and October, 1947, was 85 cents a pound, and in basing the

judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

13. The court erred in finding that the growers' market price of 85 cents a pound for said cluster hops was selected by the plaintiff and communicated to the defendant in a manner and at a time which was acceptable to the defendant and which conformed to the prior practice between the parties, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

14. The court erred in finding that the leaf and stem content of said cluster hops was three per cent more than the average of eight per cent recognized in the hop trade in Oregon in 1947, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

15. The court erred in finding that according to the general custom and usage of the trade in that year, which was known to the parties, such leaf and stem content was compensated for by deducting 1 cent per pound for each one per cent that the leaf and stem content exceeded eight per cent, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

16. The court erred in finding that the parties designated the grower's market price pursuant to

said contract at 85 cents per pound without reference to leaf and stem content, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

17. The court erred in finding that the grower's market price for said hops under said contract was 85 cents per pound net weight, less 3 cents per pound deduction for leaf and stem content as aforesaid, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

18. The court erred in finding that the contract price for said hops was 82 cents per pound, or a total of \$30,863.16, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

19. The court erred in finding that when the defendant advised the plaintiff that it did not wish to take said hops, the defendant did not specify any particular objection to said hops, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

20. The court erred in finding that upon the trial, the defendant advanced the two specific objections that said hops showed some mildew and were somewhat above average in leaf and stem content, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

21. The court erred in finding that upon the facts, neither claimed defect was material, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

22. The court erred in finding that the plaintiff delivered the very hops which were covered by the contract, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

23. The court erred in finding that said hops were of substantially the average quality of cluster hops actually accepted in 1947 by the hop trade generally and by the defendant under contracts containing in effect the same provisions as to quality, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

24. The court erred in finding that the defendant did not rely upon any warranty or representation, whether contained in the contract or otherwise, that said hops would be any different in condition or quality than said hops actually were when tendered and delivered, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

25. The court erred in finding that said hops, upon tender and delivery, substantially conformed to the quality provisions of said contract, and in

basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

26. The court erred in finding that the defendant did not reject said cluster hops prior to May 3, 1948, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

27. The court erred in finding that there had been a material decline in the general market price and demand for 1947 cluster hops, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

28. The court erred in finding that the cluster hops here involved could not readily be resold, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

29. The court erred in finding that the defendant was in default in the payment of the purchase price, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

30. The court erred in deciding that the plaintiff substantially performed all of the terms and conditions of the contract between the parties on his part to be performed.

31. The court erred in deciding that the property in said cluster hops passed to the defendant.

32. The court erred in deciding that the defendant became obligated to pay to the plaintiff on or before October 31, 1947, the sum of \$30,863.16.

33. The court erred in deciding that the defendant wrongfully refused to and did not perform its obligation under said contract.

34. The court erred in deciding that the measure of the plaintiff's recovery, upon the facts in this case, is, under the Oregon law, the difference between the amount claimed to be due under said contract and the amount realized from the resale of the plaintiff's hops.

35. The court erred in failing and refusing to apply the provision in said contract of February 7, 1944, which fixed and determined the measure of damages as the difference between the contract price of the hops the defendant was obligated to accept, and the market value thereof.

36. The court erred in deciding that the judgment against the defendant should include interest at the rate of six percent per annum from May 7, 1948, to the date of judgment.

37. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Glatt: Did you deliver hops under those contracts to John I. Haas, Inc.?

Answer: I did.

38. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Glatt: Did they take hops that were affected by downy mildew?

Answer: Yes, with the exception of 108 bales that were relatively free from mildew, not entirely, but relatively free from mildew.

39. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Glatt: What settlement did you make with John I. Haas, Inc., or what price arrangement did you make with John I. Haas, Inc., on your 108 bale lot?

Answer: They deducted 1 cent a pound for 1 percent leaf and stem content over 8 percent.

40. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Glatt: What arrangement did you make to close out the other parts of your crop on the 45-cent fixed-price contract? Did they take all those?

Answer: Yes.

41. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Glatt: Did they raise any question at all about the quality?

Answer: I believe that they deducted—I can't answer now definitely. The hops were accepted.

42. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Glatt: On the open-end contract for the fuggles, did they take all those at the regular price?

Answer: At the regular price, 90 cents a pound.

43. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Glatt: How about the open-end contract on the clusters? Did they take those?

Answer: Yes, they did.

44. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Geschwill during the trial of Fred Geschwill v. Hugo V. Loewi, Inc., Civil Action No. 4082: In the hop itself, what is the substance that makes the hop useful for brewing beer?

Answer: They use what they call the lupulin.

45. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Geschwill during the trial of Fred Geschwill v. Hugo V. Loewi, Inc., Civil Action No. 4082: If mildew were to touch the outside petals and turn them reddish or orange colored, would that normally affect the lupulin on the inside of the hop?

Answer: Not if it is in the later season. I

imagine if it is in the real early stage it wouldn't make no hop, but later on it don't affect it at all.

46. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Geschwill during the trial of Fred Geschwill v. Hugo V. Loewi, Inc., Civil Action No. 4082: What was the custom generally, in the business with respect to whether weighing in was an acceptance of hops?

Answer: That was the custom; when they was weighed, when they went over the scale and there was nothing wrong with the hops.

47. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Walker during the trial of Fred Geschwill v. Hugo V. Loewi, Inc., Civil Action No. 4082: Is that lupulin what the hop is used for in making beer?

Answer: That is what I understand, the main property of it.

48. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Walker during the trial of Fred Geschwill v. Hugo V. Loewi, Inc., Civil Action No. 4082: What is the understanding in the hop trade generally as to what use of the hop is made in making

beer? That is, insofar as it is common knowledge in the hop business.

Answer: It is my general understanding that the hop is used primarily for flavor and aroma.

49. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Walker during the trial of *Fred Geschwill v. Hugo V. Loewi, Inc.*, Civil Action No. 4082: What portion of the hop does that aroma come from?

Answer: From the lupulin, primarily, as I understand.

50. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Walker during the trial of *Fred Geschwill v. Hugo V. Loewi, Inc.*, Civil Action No. 4082: If there was an attack of down mildew sufficient to discolor the petals, make some of the petals turn a slightly reddish tinge, but not enough to get inside the petals, would that ordinarily affect the lupulin quality?

Answer: I never thought so. That, again, is a very debatable question. As you know, we have 1,200 or 1,400 brewers in the United States or whatever it may be—I do not have the number. Brewmasters, of course, do not—they might use them or buy them even though they showed that discoloration.

51. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Walker during the trial of Fred Geschwill v. Hugo V. Loewi, Inc., Civil Action No. 4082: Even with some discoloration of the petals, the hop is usually considered marketable?

Answer: Yes, I would consider them so.

KERR & HILL,

/s/ ROBERT M. KERR,

/s/ STUART W. HILL,

Attorneys for

Defendant-Appellant.

State of Oregon,

County of Multnomah—ss.

I hereby certify that I have prepared the foregoing copy of Statement of Points on which Defendant Intends to Rely on Appeal and have carefully compared the same with the original thereof; and that it is a true and correct copy therefrom and of the whole thereof.

Dated December 5, 1949.

STUART W. HILL,

Of Attorneys for

Defendant-Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed Dec. 5, 1949.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

Defendant, John I. Haas, Inc., hereby designates for inclusion in the record on appeal the following portions of the record, proceedings, and evidence:

1. Complaint.
2. Amended answer.
3. Findings of fact and conclusions of law.
4. Memorandum of decision.
5. Judgment.
6. Notice of appeal.
7. Supersedeas bond.
8. Order extending time for filing record on appeal and docketing appeal, entered November 18, 1949.
9. Statement of points on which defendant intends to rely on appeal.
10. This designation of contents of record on appeal, and all counterdesignations or further designations.
11. Complete typewritten transcript of the proceedings and testimony before the court at the trial of this case.

12. The following exhibits:

- (a) Plaintiff's exhibits having the following numbers: 1, 1-A, 2, 3-A, 3-B, 3-C, 3-D, 3-E, 3-F, 3-G, 3-H, 3-I, 3-J, 3-K, 3-L, 3-M, 3-N, 3-O, 3-P, 3-Q, 3-R, 3-S, 3-T, 3-U, 3-V, 3-W, 3-Y, 4, 5, 6, 7, 8, 9, 10, 16.
- (b) Defendant's exhibits having the following numbers: 11-A, 11-B, 11-C, 11-D, 11-E, 11-F, 11-G, 11-H, 11-I, 11-J, 11-K, 11-L, 11-M, 11-N, 12, 13, 14, 15, 18.

KERR & HILL,
/s/ ROBERT M. KERR,
/s/ STUART W. HILL,

Attorneys for
Defendant-Appellant.

State of Oregon,
County of Multnomah—ss.

I hereby certify that I have prepared the foregoing copy of Designation of Contents of Record on Appeal and have carefully compared the same with the original thereof; and that it is a true and correct copy therefrom and of the whole thereof.

Dated, 1949.

STUART W. HILL,
Of Attorneys for
Defendant-Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed Dec. 5, 1949.

[Title of District Court and Cause.]

ORDER FOR
TRANSMITTAL OF EXHIBITS

On motion of the defendant and appellant, John I. Haas, Inc.,

It Is Ordered That the Clerk of this court forward to the United States Court of Appeals for the Ninth Circuit, in connection with the appeal of the above-entitled cause, all of the original documentary exhibits in accordance with the usual practice of this court in regard to the safekeeping and transportation of original documentary exhibits.

It Is Further Ordered That the Clerk of this court be and he hereby is authorized to permit Kerr & Hill, attorneys of record for the defendant and appellant, to withdraw all of the other exhibits in this cause from the office of the Clerk of this court in order that they may be shipped to the United States Court of Appeals for the Ninth Circuit.

Dated this 7th day of December, 1949.

/s/ CLAUDE McCOLLOCH,
U. S. District Judge.

[Endorsed]: Filed Dec. 7, 1949.

[Title of District Court and Cause.]

APPELLEE'S DESIGNATION OF ADDITIONAL CONTENTS OF RECORD ON APPEAL

O. L. Wellman, plaintiff and appellee, hereby designates the following additional portions of the record, proceedings and evidence in this cause to be included in the record on appeal herein to the United States Court of Appeals for the Ninth Circuit:

1. Plaintiff's Exhibits 3-X, 3-Z and 17.

2. The proceedings and evidence (including the transcript of testimony and the exhibits) contained in the records on appeal to the United States Court of Appeals for the Ninth Circuit from the United States District Court for the District of Oregon in Civil Action No. 4082, Fred Geschwill, plaintiff-appellee vs. Hugo V. Loewi, Inc., a corporation, defendant-appellant, and in Civil Action No. 4083, Kilian W. Smith, plaintiff-appellee, vs. Hugo V. Loewi, Inc., a corporation, defendant-appellant. (Those two actions involve common questions of law and fact with this action; and on trial the parties to all three actions consented, and the District Court ordered, that the three actions be tried jointly and that the evidence in any of said actions should be deemed to have been taken and heard and should be considered in each of the actions so

tried together to the extent that such evidence was pertinent, material and relevant.)

Dated at Portland, Oregon, this 14th day of December, 1949.

ROY F. SHIELDS,
/s/ RANDALL B. KESTER,
/s/ WILLIAM E. DAUGHERTY,
Of Attorneys for
Plaintiff-Appellee.

Receipt of copy acknowledged.

[Endorsed]: Filed Dec. 14, 1949.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD ON APPEAL AND DOCKETING
APPEAL

The Motion of the defendant for extension of time for filing record on appeal and docketing appeal having been brought on for hearing and it appearing to the court that the facts set forth therein are true, and the court being fully advised in the premises,

It Is Ordered that the time within which the record on appeal may be filed in the Court of

Appeals and the appeal docketed in the Court of Appeals be and the same hereby is extended to and including the 31st day of December, 1949.

Dated this 15th day of December, 1949.

/s/ CLAUDE McCOLLOCH,
U. S. District Judge.

[Endorsed]: Filed Dec. 15, 1949.

[Title of District Court and Cause.]

DOCKET ENTRIES

1948

July 9—Filed complaint.

July 9—Issued summons—to marshal.

July 13—Filed summons with return.

Aug. 2—Filed defendant's motion for more definite statement.

Aug. 23—Entered order reserving motion until pre-trial conference. Fee.

Sept. 2—Filed answer.

Dec. 13—Entered order setting for Pre-trial Conf. on Jan. 17, 1949. Fee.

Dec. 15—Entered order setting for trial on Jan. 25, 1949. McC.

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Jan. 14—Filed Depositions of Clifford F. Noakes and Gilbert Elwin Davis.

Jan. 14—Filed Deposition of O. L. Wellman.

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Jan. 17—Record of pre-trial conference. McC.

Jan. 24—Filed deposition of Harold W. Ray.

Jan. 28—Issued subpoena and 2 copies to atty. for plaintiff.

Jan. 28—Filed subpoena and 4 copies to atty. for plaintiff.

Jan. 28—Record of trial before court. McC.

Jan. 29—Record of trial before court. McC.

Feb. 1—Record of trial before court. McC.

Feb. 2—Record of trial before court and order to file amended answer. McC.

Feb. 2—Filed amended answer.

Feb. 3—Record of further trial before court; arguments and order allowing ptff. to Feb. 17 to submit brief and deft. to March 2, 1949, and order continuing for further trial to Feb. 5, 1949. McC.

Feb. 5—Record of further trial before court. McC.

May 17—Filed defts. reply brief.

June 15—Filed ptffs. reply memorandum.

June 15—Filed memorandum of decision (for ptff). McC.

July 25—Entered order setting hearing in settlement of Findings of Fact and Conclusions of Law for Sept. 12, 1949. McC.

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Sept. 7—Lodged Findings of Fact proposed by deft.

Sept. 13—Filed additional objections to Findings of Fact and Conclusions of Law proposed by plaintiff.

Sept. 7—Filed objections to F & F & C of Law proposed by ptff.

Sept. 19—Record of hearing on Findings of Fact and Conclusions of Law argued and reserved. McC.

Sept. 22—Filed memorandum of decision (for ptff.) McC.

Sept. 22—Filed and entered Findings of Fact and Conclusions of Law. McC.

Sept. 30—Filed deft's. objections to form of proposed judgment.

Sept. 30—Filed and entered judgment for ptff. for \$19,915.10 with interest at 6% from May 7, 1948. McC.

Sept. 30—Entered judgment in Lien Docket.

Oct. 8—Filed plaintiff's cost bill.

Oct. 10—Filed stipulation concerning amount of supersedeas bond.

Oct. 10—Filed and entered order fixing amount of supersedeas bond. McC.

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Oct. 10—Filed notice of application for taxation of costs.

Oct. 10—Filed supersedeas bond.

Oct. 10—Filed notice of appeal by defendant.

Oct. 11—Mailed copy of notice of appeal to Maguire, Shields, Morrison & Bailey.

Nov. 15—Filed in duplicate, transcript of testimony.

Nov. 18—Entered order extending time for filing record on appeal to December 17, 1949. McC.

Nov. 21—Filed above order.

Nov. 21—Filed motion for above order.

Dec. 5—Filed statement of points.

Dec. 5—Filed designation of record on appeal.

Dec. 7—Filed and entered order for transmittal of exhibits. McC.

Dec. 14—Filed appellee's designation of record on appeal.

Dec. 15—Filed and entered order extending time to file appeal. McC.

United States District Court
District of Oregon

Civil No. 4158

O. L. WELLMAN,

Plaintiff,

vs.

JOHN I. HAAS, INC., a corporation,

Defendant.

Friday, January 28, 1949.

Before: Honorable Claude McColloch,
Judge.

Appearances:

MR. RANDALL B. KESTER

MR. WILLIAM E. DOUGHERTY

MAGUIRE, SHIELDS, MORRISON &
BAILEY

Attorneys for Plaintiff.

MR. ROBERT M. KERR

MR. STUART W. HILL,

Attorneys for Defendant.

TRANSCRIPT OF TESTIMONY
AND PROCEEDINGS

Mr. Kester: If the Court please, there has been a number of exhibits marked and identified previously in connection with the depositions similar to the other cases, and, as in the other cases, I will offer them all as a group.

The Court: Whatever has been offered for pre-trial and identified will be admitted here subject to the objections heretofore stated and hereafter to be stated prior to submission.

(The following exhibits were thereupon offered and received in evidence.)

Plaintiff's Exhibit 1—Sheaf of documents, the first of which is entitled "Hop Inspection Certificate" dated October 9, 1947, and including canceled check, receipts, weight slips, etc.

Defendant's Exhibit 1-A—Hop contract dated February 7, 1944, between O. L. Wellman and John I. Haas, Inc.

Plaintiff's Exhibit 2—Weight slip covering 193 bales, Lot 51.

Plaintiff's Exhibit 3-A—Telegram dated Hillsboro, Oregon, August 13, 1947, A. J. Ray & Son to John I. Haas, Inc.

Plaintiff's Exhibit 3-B—Carbon copy of letter dated August 14, 1947, A. J. Ray & Son to John I. Haas, Inc.

Plaintiff's Exhibit 3-C—Letter dated August 19, 1947, John I. Haas, Inc., to A. J. Ray & Son. [2*]

Plaintiff's Exhibit 3-D—Carbon copy of letter dated September 10, 1947, A. J. Ray & Sons to John I. Haas, Inc.

Plaintiff's Exhibit 3-E—Hop Sample Advice,

* Page numbering appearing at top of page of original Reporter's Transcript.

dated September 15, 1947, A. J. Ray & Son to John I. Haas, Inc.

Plaintiff's Exhibit 3-F——Telegram dated September 18, 1947, John I. Haas, Inc., to A. J. Ray & Son.

Plaintiff's Exhibit 3-G——Telegram dated September 24, 1947, John I. Haas, Inc., to A. J. Ray & Son.

Plaintiff's Exhibit 3-H——Pencil copy of telegram, A. J. Ray & Son to John I. Haas, Inc.

Plaintiff's Exhibit 3-I——Telegram dated Hillsboro, Oregon, September 24, 1947, A. J. Ray & Son to John I. Haas, Inc.

Plaintiff's Exhibit 3-J——Hop Sample Advice, dated September 26, 1947. A. J. Ray & Son to John I. Haas, Inc.

Plaintiff's Exhibit 3-K——Carbon copy of letter dated September 29, 1947, A. J. Ray & Son to John I. Haas, Inc.

Plaintiff's Exhibit 3-L——Letter dated September 29, 1947, John I. Haas, Inc., to A. J. Ray & Son.

Plaintiff's Exhibit 3-M——Letter dated October 1, 1947, John I. Haas, Inc., to A. J. Ray & Son.

Plaintiff's Exhibit 3-N——Carbon copy of letter dated October 2, 1947, A. J. Ray & Son to John I. Haas, Inc.

Plaintiff's Exhibit 3-O——Telegram dated Hills-

boro, Oregon, October 4, 1947, A. J. Ray & Son to John I. Haas, Inc. [3]

Plaintiff's Exhibit 3-P——Letter dated October 4, 1947, from John I. Haas, Inc., to A. J. Ray & Son.

Plaintiff's Exhibit 3-Q——Carbon copy of letter dated October 7, 1947, A. J. Ray & Son to John I. Haas, Inc.

Plaintiff's Exhibit 3-R——Telegram dated October 10, 1947, John I. Haas, Inc., to A. J. Ray & Son.

Plaintiff's Exhibit 3-S——Letter dated October 10, 1947, John I. Haas, Inc., to A. J. Ray & Son.

Plaintiff's Exhibit 3-T——Carbon copy of letter dated October 11, 1947, A. J. Ray & Son to John I. Haas, Inc.

Plaintiff's Exhibit 3-U——Letter dated October 18, 1947, John I. Haas, Inc., to A. J. Ray & Son.

Plaintiff's Exhibit 3-W——Letter dated October 30, 1947, John I. Haas, Inc., to A. J. Ray & Son.

Plaintiff's Exhibit 3-V——Carbon copy of letter dated October 22, 1947, A. J. Ray & Son to John I. Haas, Inc.

Plaintiff's Exhibit 3-X——Carbon copy of letter dated November 1, 1947, A. J. Ray & Son to John I. Haas, Inc.

Plaintiff's Exhibit 3-Y——Letter dated November 1, 1947, A. J. Ray & Son to John I. Haas, Inc.

Plaintiff's Exhibit 3-Z—Telegram dated Hillsboro, Oregon, May 8, 1948, A. J. Ray & Son to John I. Haas, Inc.

Plaintiff's Exhibit 4—Telegram dated September 30, 1947, John I. Haas, Inc., to A. J. Ray & Son.

Plaintiff's Exhibit 5—Telegram dated September 25, 1947, John I. Haas, Inc., to A. J. Ray & Son.

Plaintiff's Exhibit 6—Telegram dated September 26, 1947, John I. Haas, Inc., to A. J. Ray & Son.

Plaintiff's Exhibit 7—Telegram dated September 22, 1947, John I. Haas, Inc., to A. J. Ray & Son.

Plaintiff's Exhibit 8—Telegram dated August 13, 1947, John I. Haas, Inc., to A. J. Ray & Son.

Plaintiff's Exhibit 9—Copy of Crop Mortgage and Agreement, dated February 7, 1944, between Butte Creek Orchards by Otto Wellman and S. S. Steiner, Inc.

Plaintiff's Exhibit 10—Photostatic copy of chattel mortgage, dated February 21, 1947, between O. L. Wellman and John I. Haas, Inc.

Defendant's Exhibit 11-A—11-N—Hop Samples.

Defendant's Exhibit 12—Carbon copy of letter dated September 25, 1947, A. J. Ray & Son to R. M. Walker, Independence, Oregon.

Defendant's Exhibit 13—Hop Market Review, dated November 4, 1946.

Defendant's Exhibit 14——Hop Market Review, dated November 17, 1947.

Defendant's Exhibit 15——Hop Market Review, dated November 23, 1948.

Plaintiff's Exhibit 16——Carbon copy of Weight Slip, S. S. Steiner, Inc. (See Page 351.) [5]

Plaintiff's Exhibit 17——Photostatic copy of records of John I. Haas, Inc., covering hop purchases and sales. (See Page 413.)

Defendant's Exhibit 18——Letter dated September 16, 1947, John I. Haas, Inc., to A. J. Ray & Son. (See Page 422.)

O. L. WELLMAN

the Plaintiff herein, was thereupon produced as a witness in his own behalf and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. Your name is Otto Wellman?

A. Yes, sir.

Q. You are the plaintiff in this case, No. 4158?

A. Yes, sir.

Q. Where do you live, Mr. Wellman?

A. In Mt. Angel.

Q. What is your present occupation?

A. Just not much of anything at the present time.

(Testimony of O. L. Wellman.)

Q. Have you sold the hop ranch which you owned? A. Yes, I sold my farm. [6]

Q. How long were you engaged in the hop business? A. Since 1930.

Q. What was the place that you operated?

A. Butte Creek Orchards.

Q. Butte Creek Orchards? A. Yes.

Q. Where was that located?

A. About a mile down the river from Monitor in Clackamas County.

Q. In Clackamas County? A. Yes.

Q. What is the size of that ranch?

A. It is 225 acres in the farm.

Q. Is it all in hops?

A. No, not quite.

Q. How many hops do you have?

A. I would say around about 160 acres.

Q. Did you have both fuggles and clusters?

A. Yes, that is right.

Q. How much of fuggles and how much of clusters?

A. I think there is 120 acres of late clusters and 40 acres of fuggles.

Q. Has that been the size of the yard during the past years?

A. No, it was not that large in the beginning.

Q. In 1947 was it that same size?

A. It was that acreage in '47. [7]

Q. Had you had prior experience in the hop business before 1930? A. No, I haven't.

(Testimony of O. L. Wellman.)

Q. Approximately how many bales would you harvest from that ranch per year on an average?

A. The average on the full planting was around —oh, somewhere near a thousand bales a year.

Q. About how many bales of fuggles and how many of clusters, generally speaking?

A. Oh, somewhere from 240 to 325 bales of fuggles, and the balance late clusters.

Q. I will hand you what is marked Exhibit 1-A, which is the contract involved in this case, your contract with John I. Haas, Inc., which was entered into on the 7th of February, 1944.

A. Yes, that is right.

Q. What is the fact as to whether or not there was a series of contracts of the same date covering subsequent crops?

A. It was a five-year term contract.

Q. A five-year term contract?

A. Yes, sir, five years.

Q. Did you have a separate contract for each year? A. Yes.

Q. Were they all signed at the same time in 1944? A. Yes.

Q. Did you have any additional contracts or agreements executed [8] each year thereafter with respect to that crop? A. No.

Q. Particularly, were you required to sign a separate chattel mortgage each spring for that crop?

(Testimony of O. L. Wellman.)

A. I don't remember whether it was each year or every two years.

Q. Every two years, I guess. I will hand you this Exhibit 10 and ask you if that is the chattel mortgage which you signed on February 21st, 1947, with respect to the 1947 crop? That is a photo-static copy from the records of Clackamas County.

A. The printing is kind of small, but it is my signature there.

Q. Now, the contract in this case appears to provide for one-half of the salable crop of both fuggles and late clusters. What was the situation with respect to the other half of the crop?

A. The other half was contracted with S. S. Steiner Company.

Q. S. S. Steiner. So that between Haas and Steiner they had your entire crop under contract?

A. They split the crop.

Q. Now, what was the method customarily used for dividing up a crop in that way?

A. One got the even and the other got the odd number of bales.

Q. I see. Where were those numbers customarily assigned? Were those numbers that were put on in the warehouse?

A. The warehouse attended to those. [9]

Q. The warehouse numbers? A. Yes.

Q. That was the place where the numbering——

A. The warehouse done the numbering and the dividing.

(Testimony of O. L. Wellman.)

Q. Now, over how long a period of time had you dealt with John I. Haas, Inc.?

A. If I recollect right, I sold them the first lot of hops in 1934.

Q. Did you deal with them from 1934 on up to the time of this contract? A. That is right.

Q. Until the 1947 contract?

A. That is right.

Q. With whom were your dealings carried on with John I. Haas? That is, whom did you deal with? A. With the Salem office.

Q. With the Salem office?

A. Yes, that is right.

Q. In whose name was the Salem office?

A. Mr. Noakes.

Q. That is Clifford Noakes?

A. That is right.

Q. In what name did he carry on the business? Whom did he work for? A. A. J. Ray. [10]

Q. A. J. Ray & Son? A. That is right.

Q. And the main office of A. J. Ray & Son was in Hillsboro? A. Hillsboro.

Q. And this is Mr. Ray, who has previously testified here? A. Yes.

Q. You mentioned Mr. Noakes. Who was Mr. Noakes in that organization?

A. I think he is manager of the Salem office.

Q. The manager of the Salem office?

A. That is right.

(Testimony of O. L. Wellman.)

Q. Was there anyone else there that you dealt with?

A. Well, the field man that come out mostly to see me always was Gilbert Davis.

Q. Gilbert Davis. A. Yes.

Q. Did you ever have any dealings with any other officer or representative of John I. Haas other than Mr. Ray, Mr. Noakes and Mr. Davis?

A. It was mostly always with Gilbert Davis and Cliff Noakes.

Q. Davis and Noakes mostly? A. Yes.

Q. Did you deal with Mr. Ray at any time with respect to this particular contract in the growing season of 1947? A. No, I didn't. [11]

Q. All your business was carried on with Noakes and Davis? A. That is right.

Q. Now, in 1947 what was your total production of both fuggles and clusters? Do you recall the figure?

A. I think the figures are there: 630, the complete lot. That is fuggles and lates.

Q. 244 bales of fuggles and 386 of clusters?

A. That is right.

Q. And of that lot one-half of each was to go to Steiner and the other half to Haas?

A. That is right.

Q. I notice that this contract, unlike the others that have been referred to here, does not contain any reference to leaf-and-stem content. What was the practice between yourself and John I. Haas,

(Testimony of O. L. Wellman.)

Inc., during the prior years of this set of contracts with respect to leaf-and-stem content?

A. I had the figures that I looked up the other night, and I think there was one year that showed where the OPA ceiling price was 64 cents, and the market slip showed 62½ paid, so there must have been a reduction—I think the leaf-and-stem content was 10 percent that year. I think it was the '44 crop.

Q. That was in the year '44 they made a deduction for leaf-and-stem content?

A. I think they did.

Q. Do you recall any other year that they made a deduction for [12] leaf-and-stem content?

A. That is the only one that I had a record of.

Q. Do you know on what basis that deduction was made? Did the OPA have a scale of its own?

A. I think it was three-quarters of a cent per point over 8.

Q. After the OPA regulations went out of effect, has Haas ever made a deduction for leaf-and-stem content on your crop?

A. I would have to look that up. I don't think so.

Q. With respect to the 1947 fuggle crop, do you recall—I think the exhibits are here, but if I may refresh your memory, the pick on the fuggles was 9 percent and the pick on the clusters was 11 percent in 1947; is that correct?

A. I think the figures are there to prove that.

(Testimony of O. L. Wellman.)

Mr. Kester: Will Counsel agree with that?

Mr. Kerr: Yes.

The Witness: The Department of Agriculture's statement is there, I think.

Q. (By Mr. Kester): In taking your fuggle crop in 1947 did they make any deduction for the 9 percent pick or did they pay you the full market price for the fuggles?

A. They paid me the 90 cents for the fuggles.

Q. The 90 cents. Now, in your prior years of dealing with John I. Haas, Inc., have they ever before 1947 raised any objection to the quality of your hop crop?

A. No. We have never had a bale rejected or turned down in [13] all our dealings.

Q. They always took the crop as it came?

A. Yes.

Q. In prior years had you ever had any difficulty with mildew or other things that might affect hops?

A. Yes, I have had several severe attacks of mildew.

Q. When did you have other attacks of mildew? A. In '36 and '41.

Q. How did the mildew in those years compare with mildew in 1947?

A. Of course, in '36 I had 40 acres of early clusters, and I think off the 40 acres we only got 60-some bales of early clusters, off the 40 acres. And I don't remember just exactly what the late

(Testimony of O. L. Wellman.)

crop was, but something like four or five hundred bales, if I remember right.

Q. Was that a more serious or a less serious attack of mildew than you had in '47?

A. It was on the early hops, but the lates it was not as severe.

Q. How about in '41?

A. '41 was the smallest crop I ever raised on the farm.

Q. Small because of mildew, you mean?

A. Of mildew damage.

Q. Did Haas take in 1941 hops that had mildew damage?

A. Well, I sold every one of those hops. Of course, the mildew [14] attack was early.

Q. Did you harvest hops that had some apparent mildew on them? A. Yes.

Q. Did they take those under this same contract?

A. Yes, sir—that contract was not in effect that year.

Q. Oh, that was '41. Pardon me. Did you have a similar contract with them at that time?

A. No, I think that was an open——

Q. That was an open sale?

A. Open sale, if I remember.

Q. Did you have any other contract with Haas up to this one of 1944?

A. I don't know whether some of those deliveries

(Testimony of O. L. Wellman.)

were on contracts. Mr. Ray could probably tell. I don't recall. Mr. Ray would have that.

Q. How about the 1944 crop itself? How was it?

A. That was one of the largest crops I have ever raised.

Q. How was it with respect to mildew or mold or other things of that nature?

A. The mold was very bad in '44.

Q. The mold was bad? A. Black mold.

Q. Did Haas take hops that had mold on them in '44? A. Yes, sir.

Q. Did they take hops that had mildew on them in '44? [15]

A. Well, the mildew didn't show as much as '47.

Q. You didn't have as much mildew as in '47?

A. No.

Q. Now, in 1947 about when did the mildew appear in the vicinity of your hopyard?

A. Oh, I would say the latter part of July or the beginning of August.

Q. At that time were the hops on your vines pretty well set or were they maturing?

A. Well, they varied. Some were in the bloom and some were in the burr.

Q. Would you state what your cultivation and care consisted of during the growing season in 1947? What did you do for the crop?

A. I worked it just like I did any other year.

Q. Were you irrigating any of those hops?

A. No, we didn't irrigate.

(Testimony of O. L. Wellman.)

Q. You did not irrigate?

A. No, we didn't in '47.

Q. Did you dust or spray?

A. Yes, right from spring.

Q. About how often would you say?

A. Oh, I wouldn't say. Some yards probably nine, ten, up to eleven times, certain yards; some of them not as often. It just depended on the condition of the yards. [16]

Q. Did you have some mildew apparently in your yard in 1947? A. Yes.

Q. Now, could you give us the approximate picking dates of your fuggles and your clusters?

A. I wouldn't know exactly, but it would seem to me like it was around the 21st or 22nd of August when we finished. It could have been the 23rd or 24th. I know we had a few days' layoff between the early and late hops.

Q. When did you start harvesting the clusters?

A. The beginning of September.

Q. About the 1st of September?

A. Or the latter part of August. I forget. I think it was a day or so in August, but I would have to look up the dates exactly.

Q. Incidentally, were your hops machine-picked or hand-picked?

A. No, they were hand-picked.

Q. What was your experience with respect to pickers in 1947?

(Testimony of O. L. Wellman.)

A. Well, that is the first time I ever had to run trucks to haul pickers, in '47. It was my first experience in hauling pickers from town.

Q. Where did you haul pickers from?

A. I contracted with another grower that had early hops, too, and he hauled them from—mostly from Burnside here, at the employment office here in Portland.

Q. What was the quality of pickers that you were able to get [17] in that manner?

A. The poorest I have ever had.

Q. Were you able to exercise very much control over the picking that they did?

A. Well, I had to get the State Police in there one day to help me. Our crew just couldn't handle them.

Q. What is the fact as to whether or not you were able to keep them picking properly, picking well and cleanly?

A. Well, in plain English, you would can a bunch one day and hire another crew the next day, and the second one was probably worse than the first one.

Q. Did you take measures to try to get them to pick cleanly?

A. I done everything that I could.

Q. Do you know now approximately what price you were paying for pickers?

A. I paid 5 cents a pound on the lates, and it probably—the man hauling them, the hauling cost

(Testimony of O. L. Wellman.)

was another cent, so it probably run me around six cents on the lates.

Q. Now, did you receive advances from John I. Haas under this contract of 1944?

A. Yes, sir.

Q. Do you recall now the total amount of those advances?

A. No, I wouldn't know offhand.

Mr. Kester: I think perhaps we can stipulate for the record that there were four advances of \$5,000 each, one made on March [18] 1st, 1947, one on May 1st, one on August 14th, and one on September 10th.

Mr. Kerr: We will so stipulate.

Mr. Kester: Those figures are taken from the records here.

Q. So that you had a total of \$20,000 in advances from them at that time?

A. I think that is right.

Q. Now, tell us what the first advance of March 1st, \$5,000, would go for. What was the necessity for that?

A. Well, that is about the time you start re-planting and fertilizing.

Q. Then on May 1st another \$5,000. What would that be for?

A. Well, that is about the time we started twinning.

Q. Stringing the yard?

A. Yes, that is right.

(Testimony of O. L. Wellman.)

Q. And August 14th, \$5,000 advance. What would that be for?

A. That is just about the time of the fuggle harvest.

Q. That would be for picking fuggles?

A. That would be for picking fuggles.

Q. And an advance September 10th of \$5,000. That would be for picking the clusters?

A. Picking the late clusters.

Q. Did you have any conversation with any representative of John I. Haas with respect to selecting a grower's market price [19] under this contract? A. Yes.

Q. Would you state approximately when and where that conversation was.

A. I think it was the 12th day of September, 1947.

Q. About the 12th of September? A. Yes.

Q. Where was that? A. In Salem.

Q. And with whom did you talk?

A. Wait a minute. I don't know just exactly whether that was at Salem or when one of the boys was down—you know, it is several years ago.

Q. Did you have a telephone conversation with Mr. Noakes with respect to the price?

A. No, I didn't.

Q. To refresh your recollection, didn't you call Mr. Noakes and discuss a price of 85 cents and 90 cents?

(Testimony of O. L. Wellman.)

A. Maybe Mr. Noakes could remember that, whether that was telephone or personal.

Q. In any event, did you have a conversation with Mr. Noakes? A. Yes, I did.

Q. What was said at that time with respect to selecting the price?

A. We agreed on the market of 85 for late clusters and 90 cents [20] on the fuggles.

Q. Was that the market price at that time?

A. Yes, it was.

Q. Was anything put in writing with respect to that selection of price?

A. No, it wasn't, because I asked Mr. Noakes whether he wanted it in writing, the way the contract stated, and he stated it wasn't necessary.

Q. Did you offer to put it in writing?

A. Yes, I wanted it in writing. I asked for it in writing. And he says, "Well, that is okeh." He says, "The contract states it should be in writing, but," he said—He waived it.

Q. Now, where did you deliver the hops? What warehouse were they put in?

A. At Schwab's at Mt. Angel.

Q. Both the fuggles and the lates?

A. Yes, sir.

Q. Do you know the approximate dates on which those were delivered? For instance, had they been delivered at the time you had the conversation with Noakes about selecting the price?

A. Not all of them. The fuggles were, but not

(Testimony of O. L. Wellman.)

the late clusters. Some of the late clusters were, but not all of them.

Q. About how long afterwards were the rest of the clusters delivered to the warehouse?

The Court: We will take the afternoon recess.

(Short recess.) [21]

Q. Going back for a moment to the time of picking, Mr. Wellman, did representatives of John I. Haas come out to your hopyard during the picking season? A. Yes, several times.

Q. Did they see the way in which the hops were being picked?

A. I don't know whether they were in the yard during the time—during the picking of the lates or not. They were there before and during picking, but I don't remember whether they went into the field to examine the hops in the field or not.

Q. Did you dry them on your own place there?

A. Yes.

Q. When the fuggle-picking advance was made on August 14th, how was that check delivered to you? Did someone bring it out to your place or was it mailed? A. Mr. Davis brought it.

Q. Mr. Davis brought it out? A. Yes.

Q. And at that time were you in the process of picking the fuggles or had you started yet, do you remember, on August 14th?

A. I couldn't say whether we were picking or

(Testimony of O. L. Wellman.)

started sometime later; I know it was just about at picking time.

Q. Did you have a conversation with him at that time? A. Oh, yes.

Q. Did you have a conversation with him about your crop, do you remember? [22]

A. Oh, yes.

Q. Did you discuss the extent of mildew in your yard? A. Yes.

Q. At the time the cluster advance was made on September 10th, was that brought to you by some one person? A. Mr. Davis.

Q. Mr. Davis again? A. Yes.

Q. At that time did you discuss the crop conditions in your yard? A. Yes, we usually do.

Q. Did you discuss the extent of the mildew?

A. Yes.

Q. Did he at that time look at the hops, either in the house or in the yard?

A. On what date was that?

Q. September 10th, when he brought you the check for picking advances?

A. Yes, and he also took some samples.

Q. He took samples at that time? A. Yes.

Q. Some clusters had already been baled at that time?

A. Yes, we baled out a few bales at different points in different yards to get an idea of what they would look like.

(Testimony of O. L. Wellman.)

Q. Was that the first sampling during the picking of your [23] clusters?

A. No, I think he took one or so previous to that.

Q. Were samples taken during the picking in the usual manner—in a similar manner? A. Yes.

Q. Did you ever discuss with Mr. Davis or Mr. Noakes the matter of trying to pick selectively?

A. Yes, I mentioned it to Mr. Noakes.

Q. What is the fact as to whether or not you tried to have the hops picked selectively?

A. I had a very select group of local pickers that I have had ever since the beginning of the farm and I think two or three days prior to the main harvest I took them down at the lower end of one yard and tried it.

Q. How did it work? A. Just didn't work.

Q. Why was that? A. Well, you see——

Q. Why was that? Why isn't that a practical means of picking?

A. You would have to take every hop and you would have to pick it singly and turn it around and see if there was any mildew on it or not; just couldn't be done.

Q. Would that add to your picking costs if you attempted to do that?

A. You would have to get a couple of dollars a pound to do that. [24]

Q. That was with local pickers? A. Yes.

Q. Would it be even advisable to do anything

(Testimony of O. L. Wellman.)

like that when you had to bring in pickers by the truckload?

A. If you couldn't do it with selected people, you certainly couldn't do it with the others.

Q. When you had the conversation with Mr. Noakes about the selection of the price, do you know if he had taken other samples beyond the ones you have already mentioned?

A. If I remember right, Clifford was out at the farm two or three different times, and I told him there were some in the warehouse and that they could get samples any time they wanted.

Q. Do you know that they took samples at various times from the warehouse?

A. I think so. They were told to do so.

Q. You mean when they were put in the warehouse?

A. Yes; they were delivered on the A. J. Ray contract. They was—it was so stated on the books in the warehouse.

Q. The warehouse books carry them as the A. J. Ray contract? A. Yes.

Q. Were A. J. Ray or other representatives of the defendant notified of the hops being delivered to the warehouse? A. Yes; Mr. Davis knew it.

Q. Was there any objection ever raised to the placing of any deliveries in the warehouse? [25]

A. No, there was not.

Q. After the time of the conversation on price selection did you have any conversation with Noakes

(Testimony of O. L. Wellman.)

or anybody else representing John I. Haas with respect to weighing in the crop?

A. Yes, I told Mr. Noakes—we generally always take a duck-hunting trip every year at the beginning of October, and I told him I would appreciate it very much if we could get our hops all taken in before we would go hunting.

Q. What did he say to that?

A. He told me he would certainly do his best to see that it was done.

Q. Had he, in prior years, accommodated you in that respect?

A. Yes. I think we went hunting on the first day of the season for the last ten or fifteen years.

Q. Did you have any conversation with respect to the exact time when they would weigh in the hops?

A. The exact date?

Q. Yes. When was the date selected for weighing in the hops? Tell us about that.

A. Steiner—that is, a representative of Steiner—and Mr. Noakes, they usually always took in hops at the same date.

Q. Who was the representative of Steiner you mentioned?

A. Ray Kerr and I think Johnny Smith. I think it was Johnny Smith or Troxel.

Q. Haas and Steiner took in at the same time?

A. Yes. There were three men, I think, from each group.

Q. What was the conversation with respect to

(Testimony of O. L. Wellman.)

picking the time when they would be weighed in?

A. I think we selected the date, the 24th—I went to Salem and stopped at Larmer's warehouse and talked to Mr. Kerr, Ray Kerr, and asked him how busy they were the next day.

He said, "I have got my work practically done and if you go up to the office to see Mr. Eismann, maybe these dates could be arranged."

Q. Mr. Eismann of Steiner's?

A. Yes; so I went up to the office and talked to Mr. Eismann and he said, well, as far as he knew that would be okeh with him, so I said, "You had better call Mr. Noakes and see."

Howard Eismann called Noakes on the telephone and asked him, he said, "How about taking in Wellman's crops tomorrow? Are you too busy"? "No," he said, "I think we can make it," and he said, "Well, I will make the necessary arrangements," and Eismann called Schwab's warehouse to arrange for the warehouse and called up the State inspection office to take their leaf-and-stem content.

Q. Had there been any leaf-and-stem analysis made up to that time? A. No, there wasn't.

Q. Had you had any conversation with a representative of John I. Haas with respect to the leaf-and-stem content of your hops? [27]

A. Yes, several times.

Q. Would you tell us what conversation you had, and where?

(Testimony of O. L. Wellman.)

A. I can't remember the dates, but I went up to Ray's office in Salem one day. I couldn't remember the date, but he had some samples up there, and I went up there to look at the samples, and I asked Mr. Noakes about quality and picking and so forth and he said, "Otto, you have raised hops long enough. We will just lay some of these out on the table and you be your own judge," and he took eight or nine or ten samples of different growers from different parts of the Valley, and he took three or four samples of mine and laid them alongside and he said, "You judge for yourself. You know enough about hops that I don't have to tell you how they average with the rest of them."

Q. How did they average with the rest of what he showed you?

A. He had a few samples—I said, "You have got some beauties here. I haven't seen very many like that," and then he had some of ours and some of the others that were badly infected by mildew, and some of them in betwixt and between, so I said, "Well, mine don't look so bad, do they"? "No," he said, "they don't."

I said, "Would you call it a good, fair average"? And Mr. Noakes said, "Yes. You are a long way from being at the end of the class."

Q. Did you have any conversation then about picking? [28]

A. Yes, he said, "You didn't do too good a job

(Testimony of O. L. Wellman.)

picking," and I said, "Cliff, I know that. I done the best I could."

Q. Did you have any conversation about the adjustment of the price with respect to leaf and stem?

A. No, not at that particular date, I don't think.

Q. Did you have any other conversation about adjusting the price for leaf-and-stem content?

A. Yes.

Q. Would you tell us about that?

A. I told Mr. Noakes the contract doesn't call for leaf-and-stem content in my contract, but I told him I was willing to take a cut for the leaf-and-stem content in these hops.

Q. What cut would that be? How much?

A. We didn't know, because we hadn't had a test at that time.

Q. That was, of course, before the weighing in?

A. Yes.

Mr. Kester: The leaf-and-stem analysis, I believe we can agree, was made on October 9th. That is the date shown on the certificate.

Mr. Kerr: Yes.

Mr. Kester: The report is dated on the 9th. When did the State inspection take the sample for the leaf-and-steam analysis?

A. The same day the hops were weighed in and received.

Q. The same day of the weighing in?

A. Yes. [29]

(Testimony of O. L. Wellman.)

Q. You said that was on the 25th of September that they were weighed in?

A. The 25th of September.

Q. Tell us what happened at that time?

A. Well, it was done in the same manner that it was the year before.

Q. How were the hops divided as between Haas and Steiner?

A. Schwab's warehouse done the dividing. They agreed with each one of the dealers that they were satisfied with the way they were separating the hops. They took care of lining them up. One had one platform and the other had the other.

Q. Odds and evens?

A. They would not take odds and evens. All the bales were not numbered; that is, the warehouse number—that is, from 1 on up. They took two bales at one time and two at another, on the other side. I think that is the way they done most of it.

Q. Had there been numbering prior to the time they were divided up, with the warehouse number?

A. Yes.

Q. After dividing the bales to one platform and the other, what did they do, as far as the representatives of John I. Haas were concerned?

A. Inspected and took tenth-bale samples.

Q. Did they take tryings out of each bale?

A. Yes, they did that every year. [30]

Q. Did they put numbers on the bales?

A. Yes, they numbered them from 1 on up.

(Testimony of O. L. Wellman.)

Q. And then, after the tenth-bales were taken, did they do anything else?

A. I don't think Ray always takes tenth-bale samples. He takes them at random but does not take even numbers of samples.

Q. Instead of taking 10, 20, 30——

A. No, he doesn't.

Q. How does he get the tenth-bale samples, then?

A. He generally takes a sample bale to match his split sample that he brings with him mostly.

Q. You mean he tries several and takes a sample out of one?

A. He takes a sample and matches it as to color and picking and so forth.

Q. He would get a sample corresponding to his type sample, then?

A. Yes, and he would sometimes take two samples out of one bale.

Q. Were the hops weighed in at that time?

A. Yes.

Q. Were you present at that time?

A. Yes.

Q. Were they handled in the usual manner?

A. Exactly like they had the three previous years.

Q. Had there been any prior arrangement between you and John I. Haas respecting whether that would be done in the same way as it always had been done? [31]

A. That was not questioned, I guess, so——

(Testimony of O. L. Wellman.)

Mr. Kerr: To save considerable cross-examination, will Counsel state the name of the person with whom the conversation was had, also the time and place?

Mr. Kester: Yes. I was just trying to find out, first, if there was a conversation.

Q. Did you have any conversation with anyone representing John I. Haas with respect to the weighing-in of the crop, other than what you have told us? A. No.

Q. Did you have any conversation with Mr. Noakes or anyone else with respect to the weighing-in of the hops would not be considered an acceptance? A. No, sir.

Q. After the hops were weighed in, did you have any conversation with anyone representing John I. Haas, Inc., with respect to whether or not they were accepting the crop?

A. That was not mentioned.

Q. Was anything at all said or did anything at all transpire between the time of the weighing-in on the 25th and the time you left on the hunting trip? A. No, there wasn't.

Q. After they were weighed in, did you pay any further attention to what they did with the hops?

A. No, I didn't. The warehouse put them in the warehouse— [32] put them back in the warehouse in a pile; stacked them back into the warehouse.

Q. When did you leave on your hunting trip?

(Testimony of O. L. Wellman.)

A. I think it was the 27th day of September.

Q. How long were you gone?

A. I think we got back around the 10th or 12th of October.

Q. When you came back, did you see Noakes or anyone else representing John I. Haas, Inc.?

A. Yes.

Q. What conversation did you have with him?

A. Well, Noakes told me that things has changed since the hunting trip, that samples had to go back East or to some other office before he could settle or pay for any of the hops.

Q. Did he tell you anything like that before they were weighed in? A. No, he didn't.

Q. What is the fact as to whether or not in the hop business weighing-in of the hops is or is not considered to be an acceptance of the hops?

A. Well, that is the only way I have ever sold hops; after they went across the scales, it was delivery.

Q. Is that the recognized practice in the hop business?

A. There may have been a few cases where a few growers signed agreements that it was not an acceptance.

Q. Did you ever have any such agreement in this case? [33] A. No, I didn't.

Q. After you got back from your hunting trip, Mr. Wellman, and Noakes said that they had to send

(Testimony of O. L. Wellman.)

samples East, then what happened? What happened after that?

A. Well, that went on for some time. I would go to the Salem office and then he said, "I will call the office at Hillsboro and see whether there is any return in," and the first time he did not have any and then the second time he said, "We got returns on the fuggles," and he tendered me the balance, a check for \$842 and something, with all the advances out on the fuggles.

Q. I show you what is marked Exhibit No. 1-E. They are all marked together, but one has got the letter "E," which appears to be a computation. Is that something which Mr. Noakes compiled at that time?

A. Yes, that is the statement Mr. Noakes gave me.

Q. Does that show the manner in which he arrived at the amount of the check, \$842.20?

A. Yes. All the advances are listed on this sheet.

Q. Did he give you a check for the balance or \$842.20? A. Yes.

Q. How was that arrived at? Did they deduct all the advances?

A. Took all the advances off on the fuggles.

Q. Advances for both the fuggles and clusters were taken from the fuggle payment? [34]

A. Both, yes.

Q. Did they raise any question about the quality of the fuggles? A. No, they didn't.

(Testimony of O. L. Wellman.)

Q. Did they raise any question about the leaf-and-stem content of the fuggles?

A. No, they didn't.

Q. Did they pay you the full market price for the fuggles, after deducting all these advances?

A. Yes.

Q. Did they ever pay you for the clusters at all?

A. No, they didn't.

Mr. Kester: Will Counsel stipulate with respect to the weights shown, without going into the figures at this time?

Mr. Kerr: We will so stipulate.

Q. (By Mr. Kester): After the conversation of October 28th when he delivered you that check, Mr. Wellman, what did he say about your clusters, if anything?

A. I said, "Cliff, what have you left off on the settling on the lates, or paying for the lates"? He said, "It don't make any difference." He said, "As quick as we hear from them, we will settle. In fact, I think it would help."

Q. Did he at that time say that any fault had been found with your clusters or lates or that they were being rejected?

A. There wasn't a word of rejection mentioned.

Q. Did they ever at any time, along about that period, say anything [35] at all about rejection of your clusters? A. No, it was never mentioned.

Q. What did he say with respect to whether or not—with respect to when they were going to pay for the clusters?

(Testimony of O. L. Wellman.)

A. Well, he said he didn't know. He said he would keep calling the office and as quick as they got returns in from the East he would call me.

Q. What further conversation did you have after that time?

A. Well, it went on a little later and I said, "Could a person see Mr. Ray sometime and talk to him, Harold Ray, on the way over fishing, and hurry this thing along"? And he said, "It might be a good idea." Ray was fishing on the Wilson River. It was after the rainy season started, so I had quite a visit with Mr. Ray. I was there probably an hour in his private office.

Q. Was there anyone else present at that time?

A. No, Mr. Ray and I were alone in his private office.

Q. Did Mr. Ray say anything about the payment for the clusters?

A. Well, we had quite a visit; talked over the difficulties of the season and the ups and downs, some of the experiences we had with picking and then he said, "Otto, I will do my best," so I went home.

Q. Do his best to do what? Did he say?

A. To get the money on these fuggles, these hops, find a place for them; he said something about finding a place for them. [36]

Q. Did he say anything at that time about John I. Haas, Inc., paying for them at all?

A. No, he didn't.

(Testimony of O. L. Wellman.)

Q. Did he say he had any instructions at that time to reject them or to refuse to pay for them?

A. No, he didn't.

Q. What other conversation did you have with Mr. Ray about that?

A. Mr. Haas came from the East and I talked to Mr. Noakes and said, "I certainly would like to sit down and talk to Mr. Haas," so he made an appointment to meet with Mr. Haas at A. J. Ray's office. The date I can't remember, but it was sometime in December. We made the appointment for 10:00 o'clock in the morning, and I went to Portland early and talked—picked up Mr. Kever in Portland and we went down to Ray's office and Mr. Ray said, "Well, Otto, I am very sorry, but Mr. Haas was called away last night," or sometime in the late evening, "and he is not here."

He invited us into his office. Mr. Kever and I we stayed there probably for—at least an hour and a half, an hour or an hour and a half talking farming and general conditions.

Q. During that conversation did Mr. Ray say anything about when or whether they were going to pay for the clusters?

A. That is the thing we went over to see him about, the reason we wanted to talk to Mr. Haas, and I told Mr. Ray that I figured that Haas certainly has a moral and legal obligation to pay for these hops. Then Mr. Ray said, "Morally so, but I wouldn't just agree with you legally; but," he says, "certainly we owe you morally for them," and I

(Testimony of O. L. Wellman.)

said, "I have been tied up under this contract while the market was very good and spot hops sold very rapidly during the early part of September," and he just talked on—he said, "I will certainly see what I can do."

Q. Did he say at that time that John I. Haas, Inc., rejected your hops? A. No, he did not.

Q. Did you have any other conversation with him?

A. That is about the highlights of it as I remember it.

Q. Did you have any conversation with him after that?

A. Well, it was sometime in the latter part of April. I had an offer on the other half that were rejected from Williams & Hart. They had taken samples and Mr. Hart wanted me to come to Portland, so I came to Portland and I went up to see Mr. Hart and Mr. Hart told me, "I have got an offer on these hops, those rejected hops, those rejects, of 30 cents a pound for the half and if I could get the entire amount, including the Haas lot, I will pay 31 for the entire lot."

"Well," I said, "I can't sell the Haas lot because they are not released and I would have to see Mr. Shields before I could do anything," so I went up to Mr. Shields' office about 11:00 or 11:30 in the morning and Mr. Shields put a telephone call in to Ray's office to talk to Harold Ray, and Mr. Ray was [38] out so he told somebody in the office that

(Testimony of O. L. Wellman.)

when Mr. Ray comes in to call Roy Shields. So, while I was to lunch, Mr. Ray called and Mr. Shields asked him whether he would release these hops, that we had an offer, and that it was getting pretty late in the season and we were very anxious to dispose of these hops; that it would probably be the last chance I had to sell these hops that year, because when it gets towards the latter part of April or May, if you don't sell you are probably going to keep them. So, we went back to Mr. Haas' office—"Now," he says, "you and Mr. Kever go down to Hillsboro," that they were released, and Kever and I went down to Mr. Ray's office and he confirmed the release in the presence of myself and Mr. Kever at his office.

Q. Did he say you could go ahead and sell the hops? A. Yes.

Mr. Kester: Will Counsel stipulate that at that time the chattel mortgage, which is in evidence here, was still on file and had not been released of record; as a matter of fact, up to this time it has not been released of record? It has not been released of record up to this time, has it?

Mr. Kerr: No.

Q. (By Mr. Kester): You mentioned having an offer for the other half of the crop. Was that the half that Steiner had contracted? A. Yes.

Q. Will you tell us the circumstances about that half of the [39] crop? How did you happen to still have them? How is it they were still available?

A. They weighed them and received them the

(Testimony of O. L. Wellman.)

same way. Both lots were received exactly in the same manner, like they had in previous years.

Q. Did you have any agreement with Steiner about weighing-in should not be an acceptance?

A. No, I didn't.

Q. What did they subsequently do with their half?

A. I think I got a letter sometime in the latter part of October. I think you have a copy in the record there somewheres, where I got a letter from the Salem office that they were rejected.

Q. Did you subsequently arrive at a settlement with Steiner?

Mr. Kerr: I am going to object to that. There is no showing of materiality.

Mr. Kester: I think I can connect it up by one question.

Q. At any time, in conversation with Mr. Ray or anyone representing John I. Haas, Inc., was anything said about what John I. Haas, Inc., would pay if Steiner would settle?

A. They said they would certainly take them if Steiner would.

Q. What arrangement did Steiner subsequently make with you? What was the final outcome?

A. I turned it over to Mr. Shields and Mr. Shields filed an action and before it went to court their New York representative came out and went to Mr. Shields' office and we settled at that [40] time.

(Testimony of O. L. Wellman.)

Q. In that settlement did they pay you money? You do not have to state how much, but were you paid?

A. They paid cash; made a cash settlement.

Q. What happened to the hops?

A. And I kept the hops.

Q. Were they still in your possession at the time you had the offer from Williams & Hart?

A. Yes. That is the same lot I am talking about.

Q. Pursuant to the conversation with Mr. Ray that you have discussed here, was the entire lot of fuggles sold to Williams & Hart?

A. Not fuggles, late clusters.

Q. Late clusters?

A. Yes. Williams & Hart bought the entire lot of late clusters.

Q. At what price was that sale made?

A. At 31 cents; that is, without leaf-and-stem content; that is 31 cents for the lot.

Q. Regardless of the leaf-and-stem content?

A. Regardless of the leaf-and-stem content.

Mr. Kester: If the Court please, I may be corrected on this, but I believe the amount received on that resale was \$11,904.31 and, in the event of recovery here, that amount should be credited as the proceeds of the resale.

Q. Up until the conversation you had with Mr. Ray with respect [41] to releasing the crop for resale, had any representative of John I. Haas, Inc., ever told you that the crop had been rejected?

(Testimony of O. L. Wellman.)

A. No, sir; at no time.

Q. Did they ever pay for the clusters?

A. No, they did not.

Q. How would you compare your 1947 crop of late clusters with crops of hops which John I. Haas, Inc., had taken in prior years?

A. They weren't as good as some that they had taken previously, no.

Q. How would they compare with all of them—that is, that John I. Haas had taken? Would you say—you say they were not as good as some.

A. Well, one year—I think it was 1945—we had an enormous crop and we had a severe attack of aphids and lost 200 bales of late clusters, got awful moldy and a lot of lates—they weren't only moldy to the core; they were black clear to the outside. I delivered every one of those hops that year.

Q. Did John I. Haas pay the full contract price for them then?

A. They paid full contract price.

Q. During the 1947 season did you have occasion to examine other crops of hops in the Valley?

A. Yes, I did.

Q. Did you have occasion to examine other samples and other hops in the bale? [42]

A. Yes, quite a few.

Q. How would you say that your crop compared with the general average of what you saw in the 1947 production?

(Testimony of O. L. Wellman.)

A. You mean the average for our district or the average for the Valley, or what?

Q. Well, take it for your district and then also for the Valley as a whole.

A. There were a lot of yards that were better, but there was a large amount that was a lot worse. Mildew hit at different stages in different yards, and I would say that I had at least a good average, if not better.

Q. Would you say your hops were or were not merchantable?

A. They certainly were merchantable.

Q. Do you know whether all other crops which were taken under contracts similar to yours had an equivalent amount of mildew in them?

A. Yes, several of them, and also an open-end sales, on open-end contracts and spot sales.

Q. On open-end contracts and spot sales?

A. Yes.

Mr. Kester: You may inquire.

Cross-Examination

By Mr. Kerr:

Q. Have you refreshed your memory as to whether or not you had a term contract with John I. Haas, Inc., prior to 1944? [43]

A. I have to look up the records. There are quite a few sales, and I had a memorandum, just a list of the sales of so much money from Harold Ray checks and——

(Testimony of O. L. Wellman.)

Mr. Kester: You know what the fact is. We will agree to it, whatever it may be.

Q. (By Mr. Kerr): This is the first time you have had any controversy of any kind over your hops? A. This is the first time, yes.

Q. In all your dealings since 1934 this is the first time? A. Yes.

Q. The first controversy that you have ever had?

A. That is right.

Q. Have you ever before had hops which were as dirty as 11 per cent pick? A. Yes, I did.

Q. When?

A. I couldn't tell offhand. I would have to look up the records. I think I have some hops at home. Leaf-and-stem content now is what you mean?

Q. Yes.

A. I think I had twelve once before on one lot.

Q. When was that?

A. 1943, I think, or somewhere in there.

Q. How many bales of hops were inspected at 12 per cent?

A. I couldn't say how many bales. [44]

Q. Was it a substantial quantity?

A. Yes, quite a majority.

Q. 12 per cent pick,—is that a well and cleanly picked hop?

A. No, it is not too clean a hop, no.

Q. In fact, it is a dirty hop, is it not?

A. It is considered so now. It was not in those years.

(Testimony of O. L. Wellman.)

Q. You mean during the war years people would take anything?

A. No; just getting cleaner hops, getting a lot of machines, machine picking. The machines pick them so much cleaner than you can by hand, so probably a 12 or 13 per cent hop would be a dirty picked hop.

Q. Since this present contract, executed in 1944, was signed by you, you have not had any hops picked as dirty as 11 per cent, have you?

A. Yes, I think I have.

Q. What year was that?

A. I said I would have to look up the records. I would have to look up the books to find out what years those were.

Q. Do you consider 11 per cent pick to be a well and cleanly picked hop?

A. I think it was a fairly well picked hop in 1947.

Q. Would you call it a well and cleanly picked hop, Mr. Wellman?

A. Well, we are paying for the extra leaf-and-stem content; we are being deducted for it.

Q. Irrespective of that, irrespective of price or anything else—— [45]

A. The dealer could probably tell you that better than I could.

Q. You are a hop grower and you know what the hop growers consider to be well and cleanly picked, surely. Surely you must have some opin-

(Testimony of O. L. Wellman.)

ion on it. Would you please state to the Court whether in your judgment an 11 per cent pick is a well and cleanly picked hop?

A. I would say it is a fairly well picked hop, but not a cleanly picked hop.

Q. It is not a well and cleanly picked hop, as that term is used in the industry?

A. I said a well picked hop but probably not cleanly picked, because there were a lot of hops picked which were dirtier than that.

Q. Not cleanly picked. What is the maximum or customary percentage referred to as the maximum percentage for cleanly picked hops in Oregon?

A. We used to figure——

Q. I mean in the year 1947.

A. The State set 8 per cent.

Q. So, anything over 8 per cent is not said to be cleanly picked, is that it?

A. I would say an 8 per cent hop picked by hand is a fairly cleanly picked hop.

Q. But anything over 8 per cent is not a cleanly picked hop?

A. I just answered your question, didn't I? [46]

Q. Answer it again, because I want to know what you mean. I want to make sure what you mean, if you don't mind. Is a percentage of leaf-and-stem content over 8 per cent a cleanly picked hop?

A. I said it was fairly clean-picked hop by hand-picking, yes. It is a cleanly picked hop.

(Testimony of O. L. Wellman.)

Q. Is an 11 per cent pick a cleanly picked hop?

A. Fair-picked hop, I said.

Q. But not cleanly picked?

A. Not clean, but fair.

Q. So that you acknowledge, do you not, that your 1947 late cluster hops containing 11 per cent leaf-and-stem content, according to the Federal-State inspection certificate, were not cleanly picked hops?

A. I do not.

Q. Why not?

A. Just as I stated before.

Q. I understood you to say 11 per cent is not a cleanly picked lot of hops.

A. I said it was a cleanly picked lot of hops by hand-picking.

Q. In any event, you now want the Court to understand that in your opinion as a hop grower in 1947 11 per cent leaf-and-stem content was a well and cleanly picked lot of hops?

A. I said fairly clean-picked lot of hops, hand-picking.

Q. Your contract with John I. Haas, Inc., specifies that the [47] hops shall be well and cleanly picked, does it not?

A. Yes.

Q. Did you consider the hops in 1947,—that is, the cluster hops,—to have been cleanly picked within that term?

A. In fact, I worked harder to get that crop of hops in 1947 than I ever did in those years.

(Testimony of O. L. Wellman.)

Q. Yes, but did you consider that the hops which you finally did get in 1947, after all of your work, with the 11 per cent leaf-and-stem content, were cleanly picked as that term is used in the contract?

A. For hand-picking in 1947 they were.

Q. Is an 11 per cent leaf-and-stem content hop in 1948 considered cleanly picked?

A. I wasn't in business in 1948.

Q. How about 1946?

A. Well, I think a lot of them sold for——

Q. Irrespective of what they sold for, were they cleanly picked? A. 11 per cent?

Q. Yes.

A. Yes, they were just as good as they were in 1947.

Q. Yes. I say, irrespective of the year—You keep saying 1947 that they were cleanly picked, but, irrespective of the year, in your judgment is an 11 per cent pick a cleanly picked hop?

A. Fairly clean-picked hop for hand-picking.

Q. But not cleanly picked, just fairly cleanly picked?

A. Fairly clean, yes, hand-picking.

Q. Did the mildew attack that your yard suffered in 1947 differ in any way from previous mildew attacks? A. Yes, somewhat.

Q. In what way, please?

A. It was later. I had several attacks late; had one in 1947, one in 1943, I think it was,—1942 or 1943, a late attack.

(Testimony of O. L. Wellman.)

Q. Were the cones of the hops affected in the same way during those years?

A. It hit later; two years, it hit later. That time it hit during picking. I lost about, I would say, 100 bales or so; turned red during picking, when we had a big crop.

Q. You did not pick those red hops, did you?

A. Didn't have enough pickers to get them picked; picked all we could and it got to raining and we left the rest of them.

Q. Was the type of damage to your 1947 cluster by reason of mildew the same type of damage that you suffered in previous years?

A. Yes, it made all the petals red and brownish-red.

Q. Which year? A. '37.

Q. How about '47?

A. Well, it hit them a little earlier in '37,—or in '47.

Q. As a result of hitting the hops a little earlier in 1947, did [49] it result in immature hops?

A. What do you mean, "immature"?

Q. Not fully developed?

A. Some, yes.

Q. To what extent? Was it a general condition in your yard or a slight condition?

A. Well, a general condition all over the Valley I think in '47, the yards that I had seen.

Q. That was the condition in your yard, is that right? A. Yes.

(Testimony of O. L. Wellman.)

Q. You said representatives of John I. Haas, Inc., were at your drier during picking. Specifically, who was that?

A. You mean during the harvest?

A. Well, I believe you said they were at your drier during picking.

A. Well, they were there several times at picking.

Q. Who were they?

A. Mr. Davis was there twice during picking, two or three times.

Q. Was Mr. Noakes there?

A. Mr. Noakes was there just prior to picking.

Q. I believe you said you tried to pick selectively, is that right?

A. I tried to, yes.

Q. But you gave it up, you said, as a bad job?

A. It couldn't be done.

Q. So then, you picked them anyway?

A. Yes, I picked those——

Q. You had downy mildew in your yard and you tried to pick selectively; that is to say, you tried to pick the good hops out of there and leave the bad ones?

A. Burr by burr.

Q. But you could not do it?

A. It could not be done.

Q. So, then, you picked them all, good and bad?

A. No, I didn't pick them all, because you can never pick them all.

Q. What did you pick?

(Testimony of O. L. Wellman.)

A. Some clusters—You have clusters where there are one or two bad hops on some certain arms, and I figured on just leaving those; couldn't make any money picking them as single hops; just couldn't get them out.

Q. Did you leave any part of your yard unharvested, completely unharvested?

A. You mean entire acreages?

Q. Yes. A. No, I didn't.

Q. Did you cut down any vines before the pickers? Did you say they should not touch those vines?

A. No, I didn't. [51]

Q. Just let your pickers go through the yard, picking as they saw fit?

A. I think we ran four sections. I think I had five employees in each section that had charge of the picking and harvesting. I had men hired. I didn't do it. I had men hired to do it.

Q. To do what?

A. Section bosses to run these sections, like they run them in your hopyards.

Q. Did they tell the pickers what to pick?

A. They certainly did. That is what they were hired for.

Q. Did they tell them not to pick mildew-damaged hops?

A. I gave my section men orders and they had to follow out the best they could.

Q. But they found they could not pick just the good hops?

(Testimony of O. L. Wellman.)

A. What do you mean, just the good ones?

Q. They could not pick just the hops that were not damaged by mildew and leave the others?

A. I said we could not pick them hop for hop.

Q. As a matter of fact, along about the middle of August you did not think you would harvest any clusters, did you?

A. I guess there were lots of other growers up to that time——

Q. Did you think you would harvest any of your clusters?

A. I couldn't tell because they were in bloom, and not enough growth to tell what you are going to harvest.

Q. What was your opinion as to whether or not you were going [52] to harvest the clusters?

A. I didn't have any at that time, like a lot of other growers.

Q. You did not have any opinion?

A. Not at that time.

Q. Later on did you think you would probably pick hops?

A. Some of the burrs were dried up and some of the bloom fell off. Some burrs in the yard made a second growth; some of the arms came out and produced hops.

Q. Did you tell anyone from Mr. Ray's office that you had given up any idea of picking selectively and were going to just pick all hops?

(Testimony of O. L. Wellman.)

A. Well, I think I reported that to Mr. Noakes, that it could not be done.

Q. Did you then tell him or anyone else that you were, therefore, going to go ahead and pick both mildew-damaged hops and good hops?

A. No, I don't think I ever made that statement.

Q. Who took early samples of your clusters, do you remember? A. I think Mr. Davis did.

Q. Was that at the warehouse or out at your drier?

A. Oh, there was a lot of them taken at the farm and a lot of them taken at the drier.

Q. Did you have any conversation or do you remember any conversation with Mr. Noakes or Mr. Davis about certain of your cluster hops which appeared to be of a little better quality than others?

A. Well, I had spots in some yards where the mildew didn't hit at all. There was one little yard that we had that was pretty clear from downy mildew.

Q. I am referring particularly to hops that had been harvested and had been picked but that were not yet baled?

A. That is this one yard I was speaking of.

Q. I didn't mean to interrupt.

A. What is the next question?

Q. Did you pick hops from this unaffected part of the yard? A. Yes; sure I did.

Q. Then what did you do with those particular

(Testimony of O. L. Wellman.)

hops? A. That one yard?

Q. Well, yes, the hops that were not affected by mildew,—Did you mix them in with the other hops?

A. Yes. I had this little yard, and when I got this entire crew of 300 pickers in there it was just impossible to put a baling crew in to bale them out, so I had to mix the others in the same bins—We had only four bins and we couldn't bale—We had to put them all in the four bins to complete our harvest.

Q. So you mixed them up with the rest of the hops, these good hops that came from a particular yard?

A. Yes, one little yard that was practically free from mildew.

Q. Then, you stated all hops which were delivered to the warehouse were carried on the books of the warehouse as A. J. Ray contract hops? [54]

A. That is the way they always go in if they were contract hops.

Q. They do that customarily?

A. That is a custom of the warehouse. That is the way I have always done.

Q. In other words, that listing in the warehouse records is made at the time the hops go into the warehouse, is that right?

A. That is right.

Q. What about the warehouse certificate for

(Testimony of O. L. Wellman.)

those cluster hops? Did you deliver that to Mr. Ray? A. No.

Q. As a matter of fact, you held that, didn't you, until you finally sold the hops?

A. I hold it until I have my money for the hops.

Q. That is, your money from Williams & Hart?

A. I turned the warehouse receipt over to Williams & Hart after they paid me for the hops, yes.

Q. You at no time offered that warehouse receipt to Mr. Ray?

A. There was no warehouse receipt. I think I had a load check.

Q. What is a load check?

A. That is by loads that are brought into the warehouse.

Q. Did you ever give this to Mr. Ray?

A. I have that at home, the load checks.

Q. You did not offer those load checks to Mr. Ray at any time?

A. I do when they pay for them, like I did for the fuggles. [55]

Q. Mr. Ray, I mean.

A. The load checks don't go to Mr. Ray. They go back to the warehouse and they get a warehouse receipt for them.

Q. Then how did you handle the matter of the warehouse receipt after you sold the hops finally to Williams & Hart? Did you then take the load checks down to the warehouse and get a warehouse certificate?

(Testimony of O. L. Wellman.)

A. I turned the load checks in and had the warehouse receipt made to Williams & Hart.

Q. Yes. When did this demonstration you referred to of samples by Mr. Noakes to you take place? I believe you said on some occasion a number of samples of hops of growers were shown to you by Mr. Noakes.

A. That was in Mr. Noakes' office, the sample room.

Q. When was it?

A. That was in his sample room.

Q. When was that, do you remember?

A. I wouldn't know the exact date.

Q. Was it in September or October?

A. Must have been September.

Q. You are sure it was in September?

A. Yes.

Q. That was before you went fishing, is that right?

A. Before they even received the hops; immediately after picking—after baling and harvesting.

Q. Did Mr. Noakes tell you at that time that the samples had been sent there for inspection?

A. No, he didn't at that time.

Q. Did he tell you such samples had been sent to New York before that? A. No, he didn't.

Q. To Washington, D. C., rather?

A. No, he didn't.

Q. When was the first time, if you recall, that

(Testimony of O. L. Wellman.)

he told you samples of your hops had been sent to John I. Haas, Inc., Washington, D. C.?

A. Shortly after I returned from hunting.

Q. That would be about when?

A. Oh, about the second week in October, the 14th or 15th, some date in there, 1947.

Q. Do you recall when you started on your hunting trip?

A. Yes, the hunting season opened the 4th and we were up there, I think, the day before. That is the reason I remember that date.

Q. Shortly after your tenth-bale samples were taken of your cluster hops you went hunting, is that right?

A. What do you mean, tenth-bale samples? You mean the whole operation?

Q. Well, I believe you testified tenth-bale samples were taken of your cluster hops? [57]

A. The whole of the work was done that same day, on September 25th.

Q. Then you left for a hunting trip?

A. A day or two afterwards.

Q. A day or two after when?

A. After the 25th.

Q. After the 25th of September?

A. September, yes. We were up there the 4th of October.

Q. Then you returned about the middle of October, is that right?

(Testimony of O. L. Wellman.)

A. I think around the 13th or 14th, somewhere in there.

Q. So it must have been, then, a day or two after your samples were taken that this demonstration of samples to you by Mr. Noakes took place?

A. No, they had samples before that. Before they ever received them, they always take samples, before they do any receiving.

Q. Do you think that this occasion was before the tenth-bale samples had been taken?

A. Why, certainly, it was before tenth-bale samples, before that.

Q. Was it at that time you told Mr. Noakes you would be willing to take a cut in price because of the leaf-and-stem content?

A. That was just prior to the taking in of the hops that I told him I would agree to a cut for leaf and stem, yes.

Q. Was that on the basis of the type samples? Why did you offer to take a cut in price on the 11 per cent pick? [58]

A. Well, he said they should have been a little better picked that year. That is why I agreed to that, because the market was around 85 cents at that time, or I think it was at that time.

Q. Was anyone else present other than yourself and Mr. Noakes at that time?

A. Well, I was in his office quite a few times. I visited him alone I think the day we looked at the

(Testimony of O. L. Wellman.)

samples. I think Mr. Noakes and I were alone in his office.

Q. You said no one told you the hops were rejected. Did anyone ever tell you the hops would not be accepted by John I. Haas, Inc.?

A. No.

Q. Nobody ever told you?

A. No, they did not.

Q. Nobody ever told you the hops were not accepted by John I. Haas, Inc.?

A. No.

Q. Did anyone ever tell you the hops were not satisfactory to John I. Haas, Inc.?

A. No.

Q. Did anyone ever tell you John I. Haas, Inc., found the hops of poor quality?

A. He may have told them, but he didn't tell me.

Q. Then, as you recall it now, you had no conversation with anyone prior to May or April of 1948 about your hops being of [59] poor quality?

A. Well, Mr. Ray said on account of the mildew it was probably a little harder to move these hops that year.

Q. When did he say that?

A. I don't know. That was—I think it was around just before the holidays, sometime when I was over there.

Q. It was sometime before Christmas?

A. I don't remember the date.

Q. Was that the first time anything was said about the hops not being of good quality?

(Testimony of O. L. Wellman.)

A. No, that was never mentioned to me.

Q. On these occasions, when you talked to Mr. Ray at his office, was anyone else there other than you and Mr. Kever and Mr. Ray?

A. Mr. Kever and Mr. Ray and myself.

Q. Was any marking put upon the bales of your clusters when they were weighed?

A. What do you mean, marking,—numbers?

Q. Any kind of a mark at all.

A. They were numbered from 1 on up.

Q. Was that the only marking put on them?

A. That is the only mark that Ray or Mr. Noakes put on——

Q. Did you see anyone else put any mark on them?

A. There was the warehouse number on them.

Q. The warehouse numbers and the bale numbers were the only marks put on these bales at the time they were weighed? [60]

A. Mr. Noakes and his helpers marked them from 1 on up, and I think a “G” number, or code number—I think “99” and an initial or number, “K” or “B,” warehouse identification mark.

Q. But the name “John I. Haas, Inc.,” or the initials “J. I. H.” were not put on any of the bales?

A. They are very seldom ever put on at that time.

Q. They were not put on these bales?

A. They are not put on at that time, no.

(Testimony of O. L. Wellman.)

Q. Or any other time while they were in your possession or at least in the warehouse?

A. I don't know whether they put it on some of them or not. They generally mark them when they ship. I wasn't there when they shipped those to see whether they put it on those or not.

Q. On the clusters—You never saw that on the clusters? A. Not "J. I. H.," no.

Q. You stated Mr. Noakes on one occasion told you he would call you as soon as he had returns in from the East. Do you know what he referred to as "returns from the East"?

A. No, I don't.

Q. Did you ask him?

A. No, I didn't.

Q. What was your understanding, then, of what he was talking about, when he said he would let you know?

A. I supposed he was waiting for their order to pay for them from the Eastern office. [61]

Q. Do you recall when that conversation took place?

A. No, I don't remember those dates; just too far back.

Q. You did not state the date of your visit with Mr. Ray when he said he would do his best to find a place for the clusters.

A. That was shortly before Christmas, before the holidays.

(Testimony of O. L. Wellman.)

Q. What was your understanding of what he meant by finding a place for the clusters?

A. Well, I am not too familiar with his business. I don't know just how he was hooked up with Mr. Haas, whether they had them recontracted with a brewery or whether they went direct to Haas. I don't know.

Q. When you say he referred to a moral obligation, what was your understanding of what he was talking about?

A. A moral obligation to take these hops and pay for them.

Q. At what price?

A. At the stipulated price.

Q. The full contract price?

A. Less leaf-and-stem content.

Q. Was it your view they were obligated to take them at a price, at the stipulated price, with some deduction for leaf-and-stem content?

A. Whether he was obligated?

Q. Yes, whether or not they were obligated to take them?

A. Yes, they were delivered.

Q. Delivered where? [62]

A. To Mr. Ray or—Noakes accepted them, weighed them and marked them.

Q. Marked them with the bale numbers.

A. Yes, just like they did in 1946.

Q. You considered that to be an acceptance of the hops?

A. Certainly.

Q. And prior to that marking or that weighing,

(Testimony of O. L. Wellman.)

which you considered an acceptance, had you reached any agreement concerning the price that was to be paid for them? What was to be the price on the basis of the leaf-and-stem content?

A. 85 cents less a cent for each pound over 8 per cent pick, and a premium for under.

Q. Was that just your idea, or did you have an agreement on that with somebody?

A. We just talked about it.

Q. Who are "we"?

A. Mr. Noakes and I.

Q. What did Mr. Noakes say about it?

A. What do you mean, say about it?

Q. Did he tell you that John I. Haas, Inc., would pay that?

A. I don't think John I. Haas, Inc., was mentioned at all.

Q. Did he say that anyone else would pay that?

A. Why, certainly, we agreed to the 85 cents, so why shouldn't it—

Q. I mean 85 cents just for the leaf-and-stem content? [63]

A. Yes, that is the agreement. I said it was.

Q. You say Mr. Noakes agreed that someone would pay you the contract price less 1 cent for each 1 per cent above 8 per cent pick, is that right?

A. Yes.

Q. That is your understanding of the agreement?

A. Yes.

Q. That was an oral agreement, was it?

(Testimony of O. L. Wellman.)

A. Yes.

Q. There was nothing put in writing on that?

A. No, there wasn't.

Q. When you told Mr. Ray in April that you had an offer on your rejects, did you have any difficulty getting a release on these hops from Mr. Ray?

A. No; when Mr. Shields called him, he said he would release them.

Q. What did he say to you when you went down to his office and talked to him?

A. Well, he confirmed that statement that he made over the telephone to Mr. Shields.

Q. What did he say to you, if you remember?

A. I wouldn't remember everything that he said because I visited with him for practically an hour.

Q. When is it that you say Mr. Ray told you that John I. Haas, Inc., would certainly take these hops if Steiner did? [64]

A. I think that was the first time I visited him.

Q. That was about when?

A. The beginning of the rainy season in the fall of 1947.

Q. Was any mention of price made at that time?

A. No, there wasn't.

Q. Half of your 1947 cluster crop under contract with Steiner was rejected by Steiner because it was mildew-damaged, was it not?

A. That is what they said.

Q. That was the ground on which they rejected it, isn't that right?

(Testimony of O. L. Wellman.)

A. I think the letter reads—it says that “These hops do not come up to contract specifications, so, therefore, we reject them.” I think that is the statement in the letter.

Q. Those hops were the same quality, grade and condition as the other half?

A. They were half of that lot, yes.

Q. Mr. Steiner never did take in these hops, did he? A. They made a settlement.

Q. That settlement did not involve the taking over of the hops or the acceptance of hops by Steiner?

A. We took a cash settlement and turned them over to Williams & Hart.

Q. You kept the hops? A. Yes. [65]

Q. So, the Steiner Corporation did not even want the hops? Is that right?

A. They rejected them.

Q. Your sale to Williams & Hart was at 31 cents, on a basis of sample, wasn't it, a spot sale?

A. Yes, when they sent the samples in, they wrote across the top “Rejects,”—“S. S. Steiner Rejects, John I. Haas, Inc.,” or “J. I. Haas,”—I forget which—wrote “Rejected Samples” when they sent them to Williams & Hart office.

Q. They took them regardless of the leaf-and-stem content?

A. I don't know how they may have taken them, but they paid me 31 cents a pound.

(Testimony of O. L. Wellman.)

Q. They also took them irrespective of quality, didn't they?

A. They inspected them, went through them just like any other dealer.

Q. But you did not sell them to them as prime quality hops?

A. I sold them on sample.

Q. Was the sampling of these cluster hops by A. J. Ray & Son's men done in the manner that is customary in the industry?

A. Yes.

Q. And, in your opinion, was it properly done?

A. Yes, I think so.

Q. You stated your 1947 crop of cluster hops was merchantable. What did you mean by that, Mr. Wellman?

A. I don't think I said "Merchantable," did I?

Q. Well, what is your statement now? I think you said "merchantable." If you did not, what is it now?

A. They were good, salable quality.

Q. A good salable quality at what price?

A. We stated the price—we agreed on the price.

Q. You mean to say in your opinion you could have sold them at 85 cents a pound?

A. Yes, I could have sold them off at 85.

Q. These cluster hops with 11 per cent pick you could have sold at 85?

A. Yes, 85.

Q. Did you have any firm offer for them?

A. Several neighbors sold them without contracts, at least five or six spot sales.

(Testimony of O. L. Wellman.)

Q. 11 per cent pick?

A. Some were 11; some were 9; some figured at a premium—was getting a premium for under 8.

Q. Were they blighted hops?

A. Certainly they were.

A. As badly blighted as yours?

A. Some of them just as bad; some of them worse.

Q. Were your 1947 cluster hops well and cleanly picked? A. Fairly clean pick.

Q. Would you say that the picking was not too good?

A. I just answered that question two or three different times. [67]

Q. Would you say that the picking was not good?

A. Fairly good.

Q. I call your attention to a statement in your deposition on Page 34:

“Q. Were they well and cleanly picked?

“A. No, the picking wasn’t too good.”

Do you agreed with that now?

A. Well, fairly. Listen. Like I said before, “fairly” is a fairly good picked hop at hand-picking.

Q. Then, you are changing your position now, is that right? You want to substitute “fairly well picked”?

A. Fairly well picked.

Q. For “No, the picking wasn’t too good,” is that right? In other words, would you now say your picking wasn’t too good?

(Testimony of O. L. Wellman.)

A. I think it was a fairly good job of picking in the year 1947.

Q. Were your hops well harvested and baled in 1947? A. Yes.

Q. Your clusters, were they of even color?

A. What do you mean, the entire yard?

Q. Yes. Hops in bales, I mean.

A. I have never seen an entire hopyard that was of even color all the way through, in my life.

Q. Were these of even color?

A. Not that year, of even color.

Q. Were the samples taken from each bale, from the tenth-bales, were they of even color? [68]

A. I don't know whether they took tenth-bale samples.

Q. Did you see any samples that were taken?

A. Very few on the day they received them.

Q. Did you see any of them at all, any time?

A. Yes, I seen a few.

Q. When you saw them, were they of even color?

A. No, they were not.

Q. Why not?

A. Because I never seen a hop grow that way.

Q. In what way was the color not even?

A. You have a greenish hop; you have a yellow hop, and you have some with wind whip; you have some with mildew on them, tinted on the outside and——

Q. Were they free from damage by disease?

A. No, they were not.

(Testimony of O. L. Wellman.)

Q. What disease damage, then?

A. I said there was mildew in them.

Q. Did the samples indicate some immature hops? A. They always do.

Q. Did these? A. Yes.

Q. Wasn't that immaturity due to mildew damage?

A. Hops will never mature evenly, that is, all mature at the same time. I have never seen that. You always find some green hops or some immature hops. [69]

Q. In the samples of the 1947 clusters was there any evidence of immaturity because of mildew damage? A. Yes, there was some in there.

Q. What was your estimate, at the beginning of the harvest, of the quantity of hops you would harvest, cluster hops, in 1947? Did you make any estimate? A. I don't think so.

Q. Did the harvest turn out as heavily as you had expected?

A. No, I didn't get as many as I thought I would get.

Mr. Kerr: That is all.

Redirect Examination

By Mr. Kester:

Q. One or two questions, Mr. Wellman: Was the mildew on your hops of such a character that it affected the lupulin on the inside of the cones?

A. No.

Q. Counsel asked you about the Steiner settle-

(Testimony of O. L. Wellman.)

ment, whether Steiner ended up eventually taking your hops. Was there some discussion in connection with that settlement as to whether Steiner would take the hops at a certain price or whether he would pay you and let you keep the hops? In other words, were there many different arrangements discussed?

A. There were many angles of that kind, so many I can't remember them all. Mr. Shields handled the main part of it for me at that time.

Mr. Kester: I think that is all.

(Witness excused.) [70]

RAY J. GLATT

was thereupon produced as a witness on behalf of Plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. Your name is Ray J. Glatt?

A. Yes, sir.

Q. Where do you live, Mr. Glatt?

A. Woodburn, Oregon.

Q. Do you have a hop ranch yourself?

A. Yes, sir.

Q. How long have you been in the hop business?

A. About twenty years.

Q. Approximately how many acres of hops do you have? A. About 90 acres.

(Testimony of Ray J. Glatt.)

Q. What is your ordinary production of hops?

A. Oh, between 550 and 675 bales.

Q. Did you have a contract in 1947 with John I. Haas, Inc.?

A. Yes, sir.

Q. Through whom was that contract negotiated? Who handled the arrangements for that?

A. Mr. Clifford Noakes.

Q. He is the Salem representative of A. J. Ray & Son?

A. Yes.

Q. Was it your understanding he negotiated on behalf of John I. [71] Haas, Inc.?

A. It was.

Q. Have all your dealings with John I. Haas, Inc., been through A. J. Ray & Son or Clifford Noakes?

A. They have.

Q. Will you state what different contracts you had with John I. Haas, Inc., in 1947.

A. There were two contracts with a minimum price and guarantee of the market, and the third contract on a firm price of 45 cents.

Q. Did they cover both fuggles and clusters, or what?

A. They covered the entire crop, fuggles and clusters.

Q. What portion of the crop was on the fixed-price contract?

A. 20 acres of late clusters.

Q. 20 acres of late clusters?

A. Yes.

Q. And what was the fixed price on that contract?

A. 45 cents.

Q. What portion was covered by the other two, or either of the other two open-end contracts?

(Testimony of Ray J. Glatt.)

A. There was a balance of the acreage, or approximately 70 acres.

Q. How were they divided as between those two contracts?

A. One contract covered 20 acres of fuggles and 20 acres of late hops, and the other contract was on about 30 acres of late hops. [72]

Q. Did you, under that open-end contract, select the growers' market price? A. I did.

Q. What growers' market price did you select?

A. 85 cents on the late hops. The market at that time was 90 cents a pound on the fuggle hops.

Q. Did any of these contracts contain a clause varying the price for the leaf-and-stem content?

A. They did not.

Q. They did not? A. No.

Q. What has been the custom? Has it been customary in your dealings with John I. Haas, Inc., to make a price variation on leaf-and-stem content?

A. Not up to the time that this contract was signed, which was several years prior to 1947.

Q. This was a long-term contract?

A. Yes.

Q. It did not have the leaf-and-stem clause in it?

A. No, it did not.

Q. Did you have experience with downy mildew in your yard in 1947? A. I did.

Q. Was it rather general throughout the yard?

A. It was with the exception of part of the yard. It was [73] general, yes. However, it was worse in

(Testimony of Ray J. Glatt.)

parts of the yard than in other parts; that is, the late hops.

Q. Did it affect the fuggles at all?

A. Not that I could see.

Q. Did you have occasion to observe other hop-yards in the Valley, to see how other crops in the Valley were doing, compared to the amount of mildew you had, or to see what the situation was in the Valley at that time?

A. Not too extensively; just local.

Q. Around your own vicinity there how would you compare your mildew with what the others had?

A. Oh, mine was about average; part of it worse and part of it better.

Q. Do you remember what leaf-and-stem content you had in your various crops?

A. As I recall, the fuggle crop, the leaf-and-stem content in the fuggle crop was 7 per cent.

In the late clusters it was 9 per cent, and on the firm—that is, on the firm-price contract of 45 cents—it was 10 per cent, as I recall the figures. I would have to check them.

Q. Did you deliver hops under those contracts to John I. Haas, Inc.?

A. I did.

Mr. Kerr: I see no relevancy, your Honor, in this testimony. [74] It relates to an entirely different contract.

The Court: What is the point?

Mr. Kester: The point is, your Honor, it shows the practice of the trade and, in particular, the

(Testimony of Ray J. Glatt.)

practice of this particular buyer with respect to how it construed its own language in the contract.

The Court: On what point?

Mr. Kester: With respect to what kind of hops they took in on this contract and with respect to how they treated this leaf-and-stem content, when there is no clause in the contract covering it.

The Court: You people have discussed the case. Don't you know what the issues are?

Mr. Kester: There was no pre-trial, your Honor, and we have not had a chance to find out about their defense.

Mr. Kerr: Well, your Honor, we deny that an 11 per cent pick is a well and cleanly picked hop.

The Court: Go ahead.

Q. (By Mr. Kester): Did they take all your crop? A. Yes, sir.

Q. Did they take hops that were affected by downy mildew?

A. Yes, with the exception of 108 bales that were relatively free from mildew; not entirely, but relatively free from mildew. I made an effort to harvest these hops to the best of my ability.

Q. Was it physically possible to harvest the crop so as to [75] eliminate all the mildewed hops?

A. Not 100 per cent.

Q. You did the best you could? A. Yes.

Q. Did those 108 bales differ from the rest of the crop? A. They did.

Q. What settlement did you make with John

(Testimony of Ray J. Glatt.)

I. Haas, Inc., or what price arrangement did you make with John I. Haas, Inc., on your 108-bale lot?

A. They deducted one cent a pound for one per cent leaf-and-stem content over 8 per cent. In other words, these hops were 9 per cent and I received 84 cents a pound for these hops.

Q. What arrangement did you make to close out the other parts of your crop on the 45-cent fixed-price contract? Did they take all those?

A. Yes.

Q. Did they raise any question at all about the quality?

A. I believe that they deducted—I can't answer now definitely. The hops were accepted.

Q. The hops were accepted? A. Yes.

Q. On the 45-cent contract? A. Yes.

Q. On the other open-end contract, the open-end contract for the fuggles, did they take all those at the regular price? [76]

A. At the regular price, 90 cents a pound.

Q. How about the open-end contract on the clusters? Did they take those?

A. Yes, they did.

Q. What arrangement did you make with them on the price of those?

A. As I recall, I received 74 cents a pound for those.

Q. That was on an 85-cent selection?

A. Yes.

Q. Do you remember what the pick was on them?

(Testimony of Ray J. Glatt.)

A. As I recall, it was 9 per cent.

Q. Did you have any arrangement with John I. Haas, Inc., prior to weighing in of your crop with respect to their procedure in weighing in? Did they inform you with respect to what they would or would not do on weighing in your crop?

A. I was notified by letter from A. J. Ray Hop Company, signed by H. W. Ray, that when my hops were inspected and weighed in that did not constitute an acceptance of the crop.

Q. Ordinarily in the hop trade if there is no such agreement, would the weighing-in constitute acceptance? Is that the general practice?

A. It would, providing there was an agreement on the part of the seller and the buyer that those hops would be accepted at a certain price, and provided the general line of samples cut or tryings would meet the type sample; yes. [77]

Q. About when were your hops weighed in, do you remember?

A. I can't give you the exact date, but I believe it was along about between the 15th or 20th of August, as I recall. Pardon me; I mean September.

Q. September? A. Yes.

Q. Was it the general practice in the hop trade that, at the time they are weighed in, there are only two things that are to be determined, that there must have been a price selection and that the samples must run true to the type samples previously taken?

(Testimony of Ray J. Glatt.)

Mr. Kerr: I object to the question. It has nothing to do with price selection.

Mr. Kester: I thought he said there would be an agreement on price.

Mr. Kerr: That is different from price selection.

Mr. Kester: Would you explain that again to make sure?

The Court: Why ask it a second time? He has answered it once.

Mr. Kester: I wanted it cleared up.

The Court: Why clear it up, if he has answered it once?

Mr. Kester: I think that is all.

The Court: You mean you want him to emphasize it. You don't want to clear it up. You want him to emphasize it. Ask some other question.

Q. (By Mr. Kester): Were you subpoenaed to come here? A. Yes.

Mr. Kester: Thank you very much.

Cross-Examination

By Mr. Kerr:

Q. Would you say that your 1947 hops, your 1947 crop of hops, were badly affected by downy mildew? A. On the vines, yes.

Q. Particularly on the vines? A. Yes.

Q. How about in the bales?

A. The 108-bale lot showed traces of mildew on the petals, but, generally, I thought it was a very fair quality hop for that year.

Q. Was it because of the downy mildew in the

(Testimony of Ray J. Glatt.)

108 bales that John I. Haas, Inc., objected to those particular hops?

A. There was no objection to those particular hops.

Q. There was quite a concession on them?

A. Of one cent a pound, yes.

Q. You said you did the best you could to avoid picking mildewed hops, is that right?

A. That is correct.

Q. Is it possible to pick selectively?

A. I think it is not practical, to my way of thinking. [79]

Q. That is to say, it is too costly, is it not?

A. Yes.

Q. So the grower has a choice under those circumstances of either not picking at all or of picking and taking a chance on rejection, is that right?

A. I assume that is correct.

Q. He takes that risk if he does pick?

A. That is true if his hops do not meet the quality demanded.

Q. In 1947, about September, the market price for hops, prime quality hops, was pretty high, wasn't it? A. Yes.

Q. Wasn't there quite a temptation on the part of the grower to pick whatever he could pick? Wasn't there quite a temptation on the part of the grower to pick whatever he could pick and then take his chances on what he could get for them?

A. I can't speak for other growers.

(Testimony of Ray J. Glatt.)

Q. Was that your attitude?

A. My attitude was to pick as good a hop as I could pick.

Q. Did you leave any part of your yard unharvested at all? A. Yes.

Q. In that case, then, you felt that the best hop you could pick in that part of the yard was not good enough to market? A. Correct.

Q. So you did not pick any of them?

A. Correct. [80]

Mr. Kerr: That is all.

Redirect Examination

By Mr. Kester:

Q. On these 108 bales, was there any price concession that wasn't for leaf-and-stem content?

The Court: He said No.

A. No.

Mr. Kester: I think that is all.

(Witness excused.) [81]

JOSEPH J. KEVER

was thereupon produced as a witness on behalf of Plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. Your name is Joseph J. Kever?

A. Yes.

Q. Where do you live, Mr. Kever?

(Testimony of Joseph J. Kever.)

A. Portland, right now.

Q. Are you engaged in active business now?

A. Well, I am retired, but I try to sell real estate to keep me out of mischief.

Q. What has been your occupation over the years?

A. Banking business in Mt. Angel for about since 1907, pretty near forty years.

Q. Forty years in banking? A. Yes, sir.

Q. Your bank was at Mt. Angel?

A. At Mt. Angel.

Q. What was your position in the bank?

A. Cashier.

Q. In that position did you have anything to do with making loans on farms and things of that sort?

A. Oh, yes.

Q. Did you make it part of your business to be familiar with [2] the hop trade generally?

A. Yes.

Q. Over how long a period of time have you been familiar with the hop business?

A. At least thirty-five years.

Q. In the course of that time did your bank make loans on your judgment of hop conditions and quality and so forth? A. Yes.

Q. Did you follow the trend of the market in hops, generally? A. Oh, yes.

Q. Are you familiar with the particular hop-yard of Otto Wellman?

(Testimony of Joseph J. Kever.)

A. Yes, I have had an interest in it for a number of years.

Q. Did you have any interest in it in 1947?

A. No.

Q. Did you have occasion to be out in the hop-yard in 1947? A. Oh, yes.

Q. Did you observe the cultivation practices and the way the crop was taken care of that year?

A. Yes. I was in the habit of going out in the country and I like hops and I visited quite often during the summer.

Q. What would you say with respect to the manner in which he was taking care of the yard that summer?

A. One of the outstanding yards in the country. I think everybody in that neighborhood knows it.

Q. Were you there during picking?

A. Yes.

Q. Did you observe the manner in which the hops were being picked?

A. I went down in the yard and picked with the pickers.

Q. You picked, yourself?

A. Just to make them—just to make a good feeling. I didn't pick only for a half-hour or so, but I did that several times.

Q. What did you observe with respect to the manner in which the hops were being picked?

A. I talked to people around close to me and they were all trying to do a good job. I noticed,

(Testimony of Joseph J. Kever.)

too, that all the bosses were in there watching them, watching the picking. Some hops were covered with mildew.

Q. You did observe the presence of mildew there, did you? A. Oh, yes.

Q. What would the pickers do with respect to mildewed hops that you saw?

A. They were trying not to pick too many mildewed hops, if they could help it, but it couldn't be done.

Q. Is it possible in the hop business to pick hops so as not to pick any with mildew, if there is mildew in the yard?

A. I don't see how you can. I don't see how you can do it.

Q. How are these hops picked? How do they get them off the vines? [84]

A. They have arms and you just strip them and get them in a basket.

Q. Do they strip off a quantity of hops in one stroke? A. Oh, yes.

Q. Is it possible or feasible or practical to pick hops one at a time?

A. Well, unless you want to do it that way and it don't cost you anything, you might do it.

Q. From your knowledge of the hop business and the banking business, would it add to the farmer's cost of production if he attempted to pick the hops one at a time?

(Testimony of Joseph J. Kever.)

A. It couldn't be done and make a profit, that is sure.

Q. Did you see Mr. Wellman's hops after they were baled and sampled?

A. I saw them—I saw some samples from the bales around the place.

Q. Did you see samples of his baled crop?

A. Oh, yes.

Q. Did you have occasion to see the hop crops of others, from parts of the Valley, or of other ranchers?

A. During the hop-picking season, right about that time, I took two trips, with Mr. McNeff, hop buyer and dealer. We drove all over the country and also down towards Salem and Independence in the hop district where most of the hops are raised.

Q. Did you have occasion to see samples of the hop crops after [85] they had been harvested?

A. Yes.

Q. How would you say Mr. Wellman's 1947 crop compared with the general average of other crops harvested in the Valley that season?

A. We talked about that in driving around. There were very few that did not have some mildew. I don't know as we run across——

Q. How would you say they would be with respect to the average crop for the season?

A. I think it was average.

Q. From your knowledge of the hop business, would you say the mildew you saw in Mr. Wellman's

(Testimony of Joseph J. Kever.)

hopyard was of such nature it would get in the lupulin content of the hop?

A. It didn't get into that.

Q. From your acquaintance with the hop business and the way hops are bought and sold, what is the fact as to whether or not generally in the hop trade the weighing-in of hops is considered to be an acceptance of the hops?

A. I have always understood it that way. I had an experience myself. My brother and I had a yard some years back. Somebody bought the hops on sample, and we waited a few days to take them in, and in walking down from the bank to the warehouse—the market had dropped and I said, “I will tell you, don't weigh them in; don't stick them. We don't want them hops. If [86] they are stuck it is going to be hard to sell them; just as well turn them down now. Other buyers would know there was something the matter with those hops probably.”

Q. What is the fact as to whether hops would be readily salable after one dealer has sampled them and weighed them in and then, for any reason, has refused to pay for them?

A. Sampling don't hurt them; but if he thinks they are tied up, one dealer don't want to bother with the crop. I didn't do it. It is not good business, until things are settled. Probably you might lose out, that you can't sell them to somebody else.

Q. What would you say with respect to whether

(Testimony of Joseph J. Kever.)

or not Mr. Wellman's 1947 clusters were good, merchantable hops that season?

A. Well, I think they was average; yes.

Q. Were you present with Mr. Wellman, or Mr. Noakes, when he conversed with Mr. Ray or anyone representing John I. Haas, Inc.?

A. Yes, it seems to me we went over there about three times, the way I remember, from Portland.

Q. State what those occasions were and what happened on each one of those occasions.

A. Well, Wellman and I had talked this over, and that is all we done. We had known Ray a long time and we didn't want—I didn't want to have to go to a lawsuit to force them to take these hops. I thought maybe we could talk it over—we had dealt with him a long time—and see what he could do for us. [87]

Q. What conversation occurred between you and Mr. Ray and Mr. Wellman?

A. We talked about it, talked to Ray. He said he realized that Wellman had been in business for a long time and he said he thought something could be done; that is the main thing.

Q. Did he say anything about the hops being rejected or not paying for them?

A. No, I don't think he did, that time.

Q. Did he at any other time?

A. He might have before then—before they started suit, I mean; he might have said something about that, it seems to me, but the impression I got

(Testimony of Joseph J. Kever.)

was that he was not going to take them.

Q. When was it you got that impression?

A. It must have been about March or April.

Q. About March or April?

A. Yes, I am sure it was.

Q. Were you present at the time Wellman and Ray talked about releasing that crop so he could sell it to Williams?

A. Yes, I went over, after the attorney had called up and he said, "You had better go over and have it okehed by Mr. Ray. I talked to him over the phone," he said, "but you had better have him okeh it." That was all that was said about it.

Q. With your experience in and knowledge of the hop business, what have you observed with respect to when buyers reject hop crops with respect to market conditions? [88]

A. If the market—there are times when you can't sell a bale of hops at all to anybody. I would rather see a man sell them right out. He never knew where he was at when there was a slump in the market.

Q. During the time when the market is up, do buyers customarily say anything about quality?

A. They take most anything, because I have gone through that experience myself. When the market is up, there is no trouble.

The Court: Adjourn until tomorrow morning.

(Thereupon, at 5:30 P.M., an adjournment was taken until 9:00 o'clock A.M., Saturday, January 29, 1949.) [89]

Court convened at 9:00 o'clock A.M. Saturday, January 29, 1949.

JOSEPH J. KEVER

thereupon resumed the stand as a witness in behalf of Plaintiff and was further examined and testified as follows:

Direct Examination
(Continued)

By Mr. Kester:

Q. When the market is down, or when there is an oversupply of hops, what is the situation with respect to complaints on quality?

A. Well, more liable to find some excuse of faulty hops.

Q. From your knowledge of the hop trade generally, Mr. Kever, over a period of years, what has been the practice with respect to whether or not the weighing-in of hops constitutes an acceptance of the hops?

Mr. Kerr: May the record show our objection to that question on the ground that no proper foundation has been laid.

The Court: Overruled, subject to the objection.

A. It has been the practice for years——

The Court: He answered that yesterday.

(Testimony of Joseph J. Kever.)

Mr. Kester: I was not sure that it had been answered.

A. Yes.

Q. In your banking business did you act and did your bank act upon the basis of such trade practice? [90]

A. Yes. We considered hops were sold when they passed over the scales, giving them weight receipts showing the amount of hops they got.

Q. I believe you said you examined the Wellman crop and were familiar with its character and quality. What would you say with respect to whether or not hops of that same character and quality had been generally taken in under this type of contract over the years?

A. I watched that during this time and I would say many a lot was taken in on contracts of that kind; that is, the year 1947.

Q. How would those compare with Wellman's in character?

A. I don't know as to all of them, but I know of some that were even worse with mildew than Wellman's.

Q. They were taken in under a prime-quality contract?

A. Taken in under a prime-quality contract.

Mr. Kester: I think that is all.

Cross-Examination

By Mr. Kerr:

Q. When you refer to hops as having been taken

(Testimony of Joseph J. Kever.)

in under prime-quality contracts, what do you mean by "taken in"? A. Bought and paid for.

Q. At what price?

A. I don't know the price. The market price at that time was 85 cents, when they had an open contract. That was generally [91] known.

Q. Do you know whether or not these hops you refer to were taken in, as you call it, as full contract price?

A. Some of them may have been reduced, yes.

Q. You mean they may have been taken in at a lower price than the contract price?

A. They might have been, yes.

Q. Do you know whether they actually were?

A. I heard of a number of cases that were taken in at full price.

Q. You heard of a number of cases where they were taken in at other than the full price, too?

A. Well, you had a man here yesterday say what he did. His was the same kind.

Q. Mr. Glatt's case?

A. Concerning which Mr. Glatt testified yesterday, yes.

Q. Do you know of an instance where 1947 hops, a 1947 crop of hops, covered by a term contract, was sold by the grower at other than the contract price?

A. I don't remember just now. I couldn't name the party, no.

Q. But the cases you referred to as those where the hops were taken in under contract, in other

(Testimony of Joseph J. Kever.)

words, were those instances where the hops were taken in at reduced prices?

A. You heard that one case yesterday. I don't know.

Q. What do you mean by "weighing-in" of hops? [92]

A. Well, a representative of the buyer is there and he stabs each bale with a trier and he takes samples, the amount of samples that are agreed upon to take or sometimes they may want an extra sample. I don't think a grower will refuse them an extra sample when they want it. I think a buyer wants to get very even samples of the whole lot because he has to satisfy the people he is working for that he is doing the right thing.

Q. Is that what is meant by balancing the hop samples?

A. Yes, they say that. If there is any objection to any bale they don't like, they take it out.

I had an experience myself a number of times. If there is anything wrong with a bale, they set it out and sometimes they go over it a second time. It depends on the market. If the market is pretty good, they don't object to these little faults.

Q. What constitutes actual weighing-in? What is done in connection with weighing in hops?

A. Well, weigh them and mark it on a slip, and the grower gets a slip and the buyer keeps a slip with the weight on.

(Testimony of Joseph J. Kever.)

Q. How do they mark the bales after they weigh them?

A. They put a number on the bales, and they have the Government inspection—generally have that about that time—and they take an inspection sample, and they have a brand—

Q. Does the buyer, then, after the weighing-in of the hops, put his brand mark on the bales? [93]

A. Very seldom; once in a while, yes. When the hops are ready to be shipped, or something like that, they sometimes do that. Otherwise they come back. The buyers deal among themselves, too.

Q. Is it customary for a dealer to pay a grower for hops immediately after weighing-in?

A. Sometimes they will say, "Well, we will send you a check from the office." If you have confidence in the buyer, they do that.

Q. Do you know whether or not in this particular instance the hops had been inspected by the State or the Federal officials, Mr. Smith's cluster hops?

A. You said the Smith hops?

Q. Yes.

Mr. Kester: Smith?

The Court: No. Do you mean Smith or Wellman?

Mr. Kerr: I beg your pardon. Wellman.

Q. Do you know whether or not at the time the Wellman hops were weighed an official State inspection had been made of those hops?

A. I wasn't there.

(Testimony of Joseph J. Kever.)

Q. I beg your pardon?

A. I wasn't there. I wouldn't know.

Q. You were not present when the hops were weighed?

A. I had no financial interest in it. [94]

Q. Were you present when the hops were inspected? A. No, I wasn't there.

Q. You testified that in your opinion weighing constitutes acceptance. A. Right.

Q. Even if the leaf-and-stem content of the hop has not yet been determined?

A. They generally settle that afterwards. Sometimes you can't get the returns; may take two or three weeks to get the return from the State inspection or the Government inspection.

Q. You mean to say a dealer would accept hops without knowing that leaf-and-stem content?

A. Oh, yes, because that is arranged for.

Q. How is that arranged for?

A. In your agreements for sale. It is the custom. It has been the custom for some time.

Q. The Bailiff is handing you Defendant's Exhibit 1-A, which is the contract between the plaintiff and the defendant in this case. Will you point out in that contract the provisions——

A. What do you want me to do?

Q. Do you find any provision in that contract whereby the price is dependent on the leaf-and-stem content?

(Testimony of Joseph J. Kever.)

Mr. Kester: We will stipulate there is no such clause in the contract.

Q. (By Mr. Kerr): Now, where the sale is under a contract which [95] says nothing about leaf-and-stem content, as such—in other words, it is not a sliding-scale contract—would you say the weighing of hops by the buyer, before determination by the Federal and State officials of the leaf-and-stem content of those hops, would constitute an acceptance? A. Oh, yes.

Q. Then you consider that to be an acceptance of the hops irrespective of the fact that the leaf-and-stem content might actually turn out to be——

A. That is done right along.

Q. Then if the leaf-and-stem content develops to be 20 per cent, you consider the dealer, nevertheless, would accept the hops?

A. I wouldn't know what the dealer would do.

Q. But you state that weighing-in is an acceptance? A. It is.

Q. In that instance, would you consider that to be an acceptance?

A. Any time when a dealer has samples, his representative has samples, and he doesn't want to take them then, he would say, "I don't think you had better weigh them." I think he would use his judgment, especially where he had done business with a good, reliable man for many years, as they had done in this case. It is common sense.

Q. It is actually a matter of understanding be-

(Testimony of Joseph J. Kever.)

tween the grower and the dealer at the time as to whether or not the weighing-in is an acceptance?

A. I think that has always happened. I have never seen a case that I know of——

Q. What if the parties agreed before the weighing that the weighing was not to be an acceptance, would you say nevertheless it would be an acceptance?

A. If they had it in writing, I would say then——

Q. What if they did not have it in writing?

A. I don't know. I don't think they did that this year. They had a practice this year of doing the other, as I understood.

Q. What do you mean "they"?

A. The different large buyers.

Q. Do you know of any instance where there had been such an oral agreement before weighing?

A. I know when they take in hops without having that agreement signed——

Q. Just answer my question. Do you know of any instance where there was such an oral agreement before weighing?

A. No, I don't know. I wasn't there.

Q. If there was such an oral agreement, then the weighing-in would not be an acceptance, would it?

A. No, sir; I don't think that has anything to do with it. I don't think so.

Q. Why is it you don't think so?

(Testimony of Joseph J. Kever.)

A. I think when I have been dealing with a concern a long time [97] and they come and weigh them hops and take them in, they know what they are doing; they will be confirmed, especially in a case like this year where there is some question of quality.

Q. You are a grower and I am a dealer, suppose, and I have a contract for your 1948 crop of hops. The time comes for you to deliver the hops to me; you tender them and I say, "Well, Mr. Kever, your hops appear to me to be of poor quality. I have got to take some samples of these and send them East to determine whether the hops come up to contract quality. Therefore, I do not want any possible misunderstanding on this. I will sample them now, take these tenth-bale samples and then, in order to avoid going through them again and trying them and weighing them later, if my principals decide to take them, I am willing to weigh them now, with the understanding, however, that by weighing them I am not accepting them," and then I go ahead—you agree to that and then we weigh them, and assuming that is all oral, would you say the mere fact of this weighing would, nevertheless, be an acceptance?

A. I would say, "Don't stab these hops and don't weigh them until you are satisfied you will take them."

Q. But you say, "Go ahead and weigh the hops."

A. Take what samples you need.

(Testimony of Joseph J. Kever.)

Q. And you say, "Go ahead and weigh them and I will agree with you that will not be an acceptance." Give me a definite answer. If you and I had such an agreement and I then weighed the hops, [98] in your opinion would that constitute an acceptance of the hops?

A. I wouldn't do it.

Q. You are still not answering the question.

A. No, I wouldn't do it.

Q. But if you did do it?

A. I wouldn't do it.

Q. How close a friend of Mr. Wellman's are you? Are you related to Mr. Wellman?

A. No.

Q. You have taken quite an unusual interest in this problem, have you not?

A. I have been interested for a number of years. We always got along fine and he was an outstanding grower, worried about hops, wanted them the best in the country, and anybody that has seen his yard knows that he puts them up perfect, very fine yard. He is an awful hard worker and strictly honest.

Q. You referred to Mr. Wellman's 1947 cluster hops, I believe, as being of average quality for the 1947 season, is that right? A. Yes.

Q. The average of what?

A. Average for the year.

Q. Where? A. Down the Valley.

Q. The Willamette Valley? [99]

(Testimony of Joseph J. Kever.)

A. The Willamette Valley, yes.

Q. How many hops of the Willamette Valley did you see in the bale or samples taken out of the bales?

A. I don't remember that. I saw a good many bales, a good many thousand.

Q. You saw a good many thousand bales?

A. A good many thousand bales, in samples.

Q. Can you tell by looking at the burlap wrapping of the bale what the quality of the hops is?

A. No.

Q. Will you please explain to the Court on what you base your judgment when you say that in your opinion Mr. Wellman's 1947 clusters were of average quality for the Willamette Valley?

A. Well, in the first place, I inspected yards during the season. I was very much interested. I wasn't tied up to any business. I took another hop grower, dealer-grower, with me and we went down the Valley and we took our time; spent two days at different times.

This dealer was interested in what the mildew was doing because he was a buyer. We sized up the hops.

Some yards were very much infected. Some were pretty near rotten with it. We went back and saw Wellman's yard and he says, "Wellman's yard is much better than average," and we made our remarks about that. We talked it over.

Q. When you say Mr. Wellman's 1947 clusters

(Testimony of Joseph J. Kever.)

were equal to the [100] average of the Willamette Valley, you mean the average of these hops on the vines in the yards? A. Yes.

Q. Is that what you mean?

A. That is right.

Q. Do you know whether or not it is customary for buyers of hops to buy hops on the vine, in the green stage?

A. Yes, I know of cases when the market is very short that they have done it. They will do it sometimes.

Q. Buy the hops green on the vine?

A. Oh, yes; even arrange for picking.

Q. And then the dealer goes out and picks them himself?

A. Hires somebody to pick them. They have done that at times.

Q. I see.

A. I have seen times when the buyer will say, "I will give you so much for your yard," and he would arrange to pick them. That has happened a number of times.

Q. When that happened, the buyer went out and picked them himself? A. That is right.

Q. And dried and baled them himself?

A. That is right.

Q. Have you ever grown hops?

A. Well, I didn't go out and do the work. I was a sort of a sidewalk farmer. That is what some of my friends call me. [101]

(Testimony of Joseph J. Kever.)

Q. I didn't get that term.

A. A sidewalk farmer. This fellow that told me that, he was a German or Russian. He said, "You are a sidewalk farmer," and I said, "What is that"? He said, "You try to tell the farmers how to farm."

The Court: There are a lot of sidewalk lawyers, too.

Q. (By Mr. Kerr): Have you ever bought and sold hops?

A. I bought some a few times when they owed the bank and we didn't know what to do with them. I would take them off their hands so they could pay on the debt. I took them personally and held them sometimes two or three years to get my money back, because the market was off, and it came back and I got out of it. Never lost anything by doing that. Didn't make very much, but I did it so they could pay their notes.

Q. You never engaged in the business of buying and selling hops? A. No, I didn't.

Mr. Kerr: That is all.

Redirect Examination

By Mr. Kester:

Q. You mentioned comparing Wellman's crop with other crops on the vine. Did you also compare his samples with samples of other crops after picking? A. Oh, yes. [102]

Q. Is your judgment here, according to your

(Testimony of Joseph J. Kever.)

testimony, based also on your examination of those samples? A. That is right.

Mr. Kester: Thank you.

(Witness excused.)

E. F. WILLIG

was thereupon produced as a witness on behalf of Plaintiff and, being first duly sworn, was examined and testified as follows:

Mr. Kester: If the Court please, Mr. Ray, a representative of the Defendant here, has brought into court a quantity of samples which I am advised are samples of the Wellman lot. I don't know that they have been marked, but we have examined them and I am going to refer to them. They are identified as being Sample No. 51. I assume Mr. Ray will further identify them when he testifies.

(Hop Samples were thereupon received in evidence and marked Defendant's Exhibits 11-A to 11-N.)

Direct Examination

By Mr. Kester:

Q. State your name, please.

A. E. F. Willig.

Q. Where do you live?

A. Mt. Angel, Oregon. [103]

Q. What is your business?

A. A farmer, principally, and Manager of the Oregon Hop Producers Cooperative.

(Testimony of E. F. Willig.)

Q. The Oregon Hop Producers Cooperative?

A. Yes.

Q. What is that cooperative? What do you do?

A. Marketing of hops.

Q. Over how large an area does that cooperative operate?

A. Oh, at the present time it probably covers a radius of about twenty miles.

Q. About how many members do you have, off-hand?

A. At the present time we have around nearly thirty members.

Q. What is your general method of operation? Just describe generally how you work?

A. Well, in a sort of a way, just contract with growers.

The Court: It is the usual cooperative plan?

A. Yes.

The Court: Along State and Federal lines?

A. That is right. The hops are delivered to the warehouse and then we sell them for the members.

Q. (By Mr. Kester): During 1947 how many bales of hops did you handle at the Co-op., approximately? A. Very nearly 1200, if I recollect.

Q. Did you have occasion to be familiar with general conditions in the hop market in 1947?

A. I think so. [104]

Q. Were you familiar with the hop crop in Mt. Angel and in the Willamette Valley area in 1947?

A. What?

(Testimony of E. F. Willig.)

Q. The hop crop, the volume or character of it?

A. I think so.

Q. Over how many years have you been engaged in the hop business?

A. I raised my first crop in 1932.

Q. Have you been in the hop business continuously since that time?

A. There was two years I was out of it during that time.

Q. Did you have occasion to examine, here in the courtroom, some of the samples of Mr. Wellman's crop, that have been marked and referred to by No. 11? A. I did.

Q. How would you say, from your examination of these hops, that these hops compared with the average you saw in 1947?

A. I would call them an average hop for that year, except probably the picking. I couldn't call it a clean pick. All the farmers that hand-picked that year had trouble, and the general average was a little on the dirty side.

Q. So they would be about average for that kind and quality of hops and picking, as well?

A. I think so.

Q. Would you say from your experience in selling hops over [105] the years that hops of the same general character and quality of these had been accepted under this type of contract?

A. Yes, they had.

Q. In 1947 to whom did you sell your hops?

(Testimony of E. F. Willig.)

A. Directly to the breweries.

Q. Did you sell hops to breweries of the same general kind and quality as you have seen here in the courtroom?

A. That is about all we had to sell that year in the form of late hops.

Q. Did they accept them and make beer out of them? A. That is right.

Q. Your answer is Yes? A. Yes.

Mr. Kester: That is all.

Cross-Examination

By Mr. Kerr:

Q. Did your cooperative association operate last year? A. They did.

Q. And this year, too? A. Yes.

Q. Approximately what quality of hops did it handle in 1947—what volume, I should say?

A. I think I said nearly 1200 bales, if I remember correctly.

Q. And 1948? [106]

A. Just about the same number of bales.

Q. You refer to the Wellman samples as being an average. An average of what?

A. I beg your pardon?

Q. An average of what?

A. An average of the late cluster crop in that vicinity for 1947.

Q. In that vicinity; you mean in the vicinity of Mt. Angel? A. Yes.

Q. Within a 20-mile radius?

(Testimony of E. F. Willig.)

A. That is what I would say, yes.

Q. Do you know anything about the quality or condition of the hops produced in 1947 in the Yakima Valley area?

A. No, I couldn't state that.

Q. Do you know anything about the quality or condition of late cluster hops produced in Oregon, outside of in the area around Mt. Angel?

A. No, I couldn't state anything about quality.

Q. Do you know anything about the quality and condition of the 1947 cluster hops produced in California?

A. No, I don't.

Q. The Wellman samples do show mildew damage?

A. They do.

Q. Would you say that is a substantial mildew damage?

A. Well, not—as I said before, I just call it average. I [107] have seen samples with much more and I have seen samples with quite a bit less mildew damage than that.

Q. That is the average you mean for 1947?

A. I would think.

Q. You are still referring, when you speak of average, to the Mt. Angel area?

A. Yes.

Q. How would it compare with the average in that area for 1946, as far as mildew damage was concerned?

A. Well, if I remember correctly, we didn't have any mildew damage in 1946 so naturally the quality,

(Testimony of E. F. Willig.)

so far as the color of the sample and the hop would be concerned, was altogether different.

Q. You say, I believe, that the sample is not a sample of a cleanly picked hop, is that right?

A. I don't think you can call that a cleanly picked hop. As I said before, for that year the picking crews were having trouble with hand-picking, such as they did. I think that statistics will bear out that the picking was, on an average, much dirtier in 1947 than it was, for instance, in 1948.

Q. You are again referring to the Mt. Angel area? A. Yes.

Q. Would you say the Wellman samples are of even color?

A. I have only looked at two different samples. I didn't notice too much difference. [108]

Q. I mean the samples in evidence. Is the sample of an even color?

A. I believe I would say so, yes.

Q. Does it show any brown spots indicating mildew damage?

A. It shows mildew is there. That is quite evident.

Q. Then it is not of even color?

A. Couldn't call it even color, as far as one color was concerned, no.

Mr. Kerr: That is all.

Redirect Examination

By Mr. Kester:

Q. Are hops always exactly the same color?

(Testimony of E. F. Willig.)

A. No, I wouldn't say that.

Q. Would you say the color varies from year to year, just like other conditions?

A. It does.

Q. You would sometimes have variations in color within a single crop?

A. Yes, as far as that goes, in different yards they may be of the same form, but they will still have different color, as far as that is concerned.

Q. You have spoken of mildew and you have observed these samples. Is that mildew merely on the outside petals or did it go clear into the core?

A. I don't believe I noticed real mildew damage to the core to any extent except, of course, the nubbins, and they are not considered hops.

Q. As far as the hops themselves are concerned, the mildew appeared on the outside petals?

A. It did.

Mr. Kester: I think that is all.

Recross-Examination

By Mr. Kerr:

Q. Does your cooperative sell direct to breweries? A. It does.

Q. Do you sell through a broker or representative?

A. We have an agent on the East Coast, but our invoicing and all of our business is done right through our office.

Mr. Kerr: That is all.

(Testimony of E. F. Willig.)

Mr. Kester: You were subpoenaed to come here?

A. Yes.

Mr. Kester: That is all.

(Witness excused.) [110]

O. J. SCHLOTTMAN

was thereupon produced as a witness on behalf of Plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. Your name is O. J. Schlottman?

A. Yes.

Q. Where do you live, Mr. Schlottman?

A. Mt. Angel.

Q. Are you in the hop business there?

A. Yes.

Q. How big a place do you have?

A. 110 acres.

Q. About what is your average annual production of hops? A. You mean acreage?

Q. No, bales, approximately.

A. Approximately around 100 or 115 bales.

Q. How long have you been in the hop business?

A. Since 1928.

Q. Continuously since that time?

A. Right.

Q. Do you have a hopyard anywhere else but in Mt. Angel?

(Testimony of O. J. Schlottman.)

A. Well, I had a place in Idaho but I sold that to my boys now.

Q. Your boys are operating it now?

A. That is right. [111]

Q. Have you more or less kept track of conditions over there as well as in Oregon?

A. Pretty well so.

Q. Do you recollect the crop conditions in 1947?

A. Yes.

Q. Did you yourself raise a crop of hops in 1947?

A. I did.

Q. Did you have occasion to be familiar with the conditions in hops generally in 1947 in Oregon?

A. I did, in the Valley, yes.

Q. Have you had occasion to examine the samples that were brought into the courtroom of Mr. Wellman's 1947 clusters that were marked Exhibit 11? You have seen some of these samples?

A. I looked at them yesterday.

Q. What would you say with respect to how those samples compared in quality with the general average of the 1947 crop that you observed?

A. Well, what I observed, I would say they was an average hop.

Q. Were you say they were a merchantable hop for 1947?

A. I would say yes.

Q. What would you say with respect to whether or not hops of that same character and quality had been taken in under this type of contract in prior years?

A. I don't understand that.

(Testimony of O. J. Schlottman.)

Q. Have hops of the same general character and quality been [112] accepted by buyers under this type of contract in prior years and in 1947?

A. Well, in prior years I would say they have been.

Q. In 1947 were hops of that same general character accepted under these contracts?

A. Well, I couldn't answer that because I didn't—

Q. But in prior years you had experience with hops of that same kind and character being taken in under these contracts calling for prime quality?

A. Well, I have seen them taken, yes.

Mr. Kester: That is all.

Cross-Examination

By Mr. Kerr:

Q. Were any of your 1947 crop of hops rejected?

A. No.

Q. Do you know of other growers whose hops were rejected?

A. Outside of these here, that is the only ones that I paid any attention to.

Q. Did you hear of any others being rejected? As a matter of fact, a substantial quantity of Oregon's 1947 crop was rejected under contracts, was it not?

A. There was hops rejected on contract, but I couldn't say whose they were.

Q. It is common knowledge that a substantial quantity was rejected, [113] is that not true?

(Testimony of O. J. Schlottman.)

A. These are the only three lots that I really have reference to.

Q. These are the only three lots you have personal knowledge of? A. That is right.

Q. You said samples of the Wellman hops were examined and that the samples of the Wellman hops that you examined here were of average quality. Average of what?

A. Of the Willamette Valley, I would say.

Q. Of the Willamette Valley?

A. Of the Willamette Valley, in the yards that I examined. Of course, these samples are a year and a half old and it would be pretty hard to judge.

Q. Are you basing your opinion as to the comparison of the Wellman samples with other hops grown in the Willamette Valley in 1947 upon your recollection of what you saw in the yards that you visited?

A. Well, more so, yes. I didn't see too many samples without being in the bale.

Q. As a hop grower you know, do you not, that a hop on the vine is not necessarily a hop in the bale. Isn't that true? A. That is true.

Q. And that the condition of the hop on the vine does not necessarily indicate the condition of the same hop in the bale? [114]

A. If it is picked and put in the bale, it would be.

Q. In the same condition as it was on the vine?

A. If it was properly cured and handled, yes.

Q. That is a very big "if," isn't it?

(Testimony of O. J. Schlottman.)

A. Maybe I should not use that word "if," but I would say if it was properly cured and handled it would be the same.

Q. How about wind damage occurring in the yard after you saw the hop on the vine?

A. There is wind whips, what they call that.

Q. How about sack burn; are you familiar with that?

A. There could be.

Q. There could be a mildew attack upon a particular hop cone before it is harvested, but after you saw it, could there not?

A. You mean, after I saw it?

Q. Yes. A. Could be.

Q. Would you say the samples of the Wellman hops you examined showed mildew damage?

A. They do.

Q. Would you say they were cleanly picked?

A. Well, I wouldn't think they was cleanly picked, but they had a sliding scale of 8 per cent—I would presume 8 per cent would be a clean-picked hop, and there is a sliding scale up or down.

Q. 11 per cent is not considered a cleanly picked hop, is it? [115]

A. Well, no, it is not a clean-picked hop but it is a good merchantable hop, I would say.

Q. What do you mean by "merchantable hop"? You mean a salable hop, that there may be a sale for it?

A. A usable hop.

Q. A useful hop?

The Court: A usable hop.

(Testimony of O. J. Schlottman.)

Mr. Kerr: Oh, a usable hop.

Q. Have you sold all your 1947 crop of hops yet? A. No, I have not.

Mr. Kerr: That is all.

Redirect Examination

By Mr. Kester:

Q. You were subpoenaed to come here, were you? A. I was.

Mr. Kester: Thank you very much.

(Witness excused.)

Mr. Kester: The plaintiff is willing to rest with the reservation made in the other case as to any amendment that may become necessary to the pleadings.

(Plaintiff rests.) [116]

Mr. Hill: I have here the amended answer that your Honor gave me leave to file. That is in the Smith case and in the present case, the Wellman case. We filed simply a general denial. We filed that at Judge Fee's suggestion following a motion directed to the pleadings. He said, "You can amend at the time of pre-trial."

We request leave to amend our answer in the Wellman case by making a simple allegation of fact, if your Honor will give us permission.

The Court: It may be amended.

Mr. Hill: May I read that into the record?

The Court: That is not necessary; just give it to Counsel and he can read it while you are examining a witness. Do you have a copy?

Mr. Kester: No, your Honor.

Mr. Hill: I will give one to Counsel. [117]

Defendant's Testimony

HAROLD W. RAY

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. Will you state your name, please?

A. Harold W. Ray.

Q. You have testified in the two previous cases, have you not? A. I did, yes.

Q. What is your connection with A. J. Ray & Son, Inc.? A. I am President and Manager.

Q. That is a corporation, is it not?

A. It is.

Q. What is the relationship between A. J. Ray & Son and the defendant in this case?

A. A. J. Ray & Son represent the defendant in the purchase of hops in the State of Oregon.

Q. How long has the company represented the defendant?

A. I believe since 1917, but not exclusively that entire time.

Q. When you say that they have represented the defendant, what do you mean?

(Testimony of Harold W. Ray.)

A. I mean that we buy and contract hops for the defendant in the State of Oregon and also look after the shipment of those hops. [118]

Q. And that has been the type of representation throughout the period you mentioned?

A. Yes.

Q. How many people are there in your organization, A. J. Ray & Son?

A. Do you mean stockholders or——

Q. No, I mean employees or officers.

A. Let's see. Seven, I believe.

Q. Will you state who they are?

A. Mr. C. F. Noakes is a stockholder in the company and a director, and is manager of the field office which is at Salem, Oregon. As assistants in the Salem field office we have Mr. Gilbert Davis and Mr. Bud Troxel.

In the Hillsboro office we have Mrs. Anna Townsend, who is secretary and office manager, Miss Catherine Matheson, who is secretary and stenographer, Mr. Walter von der Werth who is the bookkeeper and general assistant in the sample room, and myself.

Q. How long has Mr. Noakes been with the company?

A. I can't remember exactly, but I believe in excess of thirty years. He could tell you, though.

Q. He is in charge of your Salem office?

A. Correct.

Q. How long has he been in charge of that of-

(Testimony of Harold W. Ray.)

Q. fice? A. That I can't remember, Mr. Kerr.

Q. Was he in charge of that office during the year 1947?

A. Oh, yes. He has been there much longer than that.

Q. Were all of the persons you have named with your organization through 1947?

A. Yes.

Q. As the representative of John I. Haas, Inc., have you been authorized to inspect hops which are tendered to your company under prime contracts?

A. Mr. Kerr, when you address a question of that sort to me, you are referring to us as a corporation and not to me as an individual?

Q. Yes, your company.

A. We have, yes. Yes, we are authorized.

Q. You personally do not represent John I. Haas, Inc., in connection with buying hops, is that right? A. I do not, no.

Q. The representation is entirely through the company that you are with, is it?

A. Correct.

Q. Did you cause the 1947 late cluster hops baled by Mr. Wellman to be inspected by your men?

A. I did, yes.

Q. And when was that done?

A. I can't tell you without referring to notes, Mr. Kerr.

Q. Do you have the notes with you? [120]

A. Yes, I think I have. Yes. Just prior to Sep-

(Testimony of Harold W. Ray.)

tember 25th. I can't tell you the exact date. It was a few days in advance of that, as I recall it.

Q. Did you issue instructions to your employees in that connection?

A. I issued instructions to Mr. Noakes.

Q. What were those instructions?

A. I instructed Mr. Noakes to have a talk with Mr. Wellman and have an express understanding and agreement with him that, to facilitate the handling of those contract hops, as to whether or not they would be accepted, that he would be willing to inspect the hops, put a head number on them and weigh them and take tenth-bale samples of them, with the understanding expressly that that did not constitute acceptance of the hops; that the acceptance of the hops had been taken out of our hands by John I. Haas, Inc., and they required that we send tenth-bale inspection samples to them for their inspection and determination as to the quality; and, in order to accomplish that and put these inspection samples in the hands of John I. Haas, Inc., it would be necessary for us to inspect them, and we would weigh them as a matter of convenience in case that some compromise settlement should be reached later, and it would not be necessary to re-weigh the hops at additional expense.

I particularly cautioned Mr. Noakes that he must have that definite understanding with Mr. Wellman that our weighing [121] them and inspect-

(Testimony of Harold W. Ray.)

ing them would not constitute an acceptance of the contract.

Those instructions were exactly in accordance with instructions that I had received from John I. Haas, Inc., and immediately subsequent to the inspection of Mr. Wellman's hops we wrote letters to the other contract growers who had contracts with John I. Haas, Inc., specifying those conditions.

Q. You are being handed Exhibit 12. Will you state, please, what that is?

A. This particular letter is a copy of a letter addressed to Mr. R. M. Walker, Independence, Oregon, and it contains, in substance, exactly what I have just related, that we would be willing to accept—I do not mean that. I mean to inspect, and to take tenth-bale samples and to weigh.

Q. Will you read the letter, please?

A. Yes, I will.

The Court: No. Let's do not do any letter-reading. I will read it myself.

A. All right.

Q. (By Mr. Kerr): Is that the general form of the letter that you refer to as having been sent to other growers?

A. Exactly. They were precisely the same to each of the other growers. That was the general practice. However, we were dealing with Mr. Wellman's hops prior to the time I was instructed to send these letters to growers, but I had that under-

(Testimony of Harold W. Ray.)

standing [122] with Mr. Noakes that it must be done. The letters were being written that day.

Q. Was such a letter addressed to Mr. Wellman? A. It was not.

Q. Why not?

A. Because they were weighing and inspecting Mr. Wellman's hops the day these letters were being written and I told the office,—that is, Mrs. Townsend,—that it was not necessary to send any to Mr. Wellman because his hops were being inspected.

Q. How were those instructions to Mr. Noakes communicated to him?

A. Probably by telephone. I talked with Mr. Noakes on the telephone nearly always once a day and very frequently a number of times a day.

Q. Did Mr. Noakes later make any report to you concerning compliance with your instructions?

A. He advised me that he had complied with those instructions and that he had instructed—that he had inspected and sampled and weighed the Wellman hops, and that Mr. Wellman had agreed to permit that to be done under those conditions.

Q. Do you recall when he reported that to you?

A. He reported that to me on the night of the 25th of September. That was the night of the day that the hops were inspected. When I say “night” I mean evening, after 6:00 o'clock.

Q. Do you recall what samples he took of Mr. Wellman's hops? [123] By that I mean do you recall how many were taken?

(Testimony of Harold W. Ray.)

A. At various times during the season or at the time of inspection, do you refer to?

A. Various times during the season.

A. May I again refer to notes?

Q. You may.

A. You refer to cluster hops or clusters and fuggles, or both?

Q. Clusters only.

A. Clusters only, on the 15th of August they took three samples.

Q. Is that August or September?

A. September, I should say, they took three samples of cluster hops and—Pardon me. That would have been on the 13th or 14th. The 15th was the day we received the samples in our office at Hillsboro, and on the 25th of September they took 19 samples of the cluster hops, then, inspection samples.

Q. Were those inspection samples numbered?

A. They were not numbered when they came to our office. I mean they were not lot-numbered. They had Mr. Wellman's name, the number of bales, marked on the samples.

Q. Was a lot number assigned to them later?

A. A lot number was assigned in our office. It had been assigned when we received the first sample of the cluster hops.

Q. What was that lot number?

A. Lot No. 51.

(Testimony of Harold W. Ray.)

Q. There will be handed to you Exhibits 3-E and 3-J. [124] A. Yes.

Q. Referring to 3-E—

A. That is a copy—No, wait a minute. It is the original Hot Sample Advice addressed to John I. Haas, Inc., Washington, D. C., listing the number of samples that were sent to them by prepaid express on September 15th, and among those samples were three samples of No. 51 clusters, the Wellman hops.

Q. Was there one sample of No. 52?

A. Yes, there was one sample of No. 52.

Q. Were those Wellman clusters?

A. 32 bales. They were so indicated at that time. The sample came in to us marked "Wellman," 64 bales total; 32 bales, one-half of which we had under contract.

Q. Did you receive a report from your field man explaining how he took different samples, why there was one sample of 32 bales?

A. Yes, there was one sample—these two lots made up 64 bales total. This 32 bales was an estimate by Mr. Wellman of the number of bales of hops he would have like that sample, which were of much better quality than the other hops, the other cluster hops, and apparently picked from a certain yard or a portion of a certain yard, and later, when they were about to inspect the hops, they were unable to find that 32 bales, or that 64 bales, in the whole lot, and Mr. Wellman at that

(Testimony of Harold W. Ray.)

time stated that he had been obliged, by lack of storage room, to mix the other cluster hops in with those hops which had been picked, which he thought was going to make 64 bales, and, therefore, [125] the 32 bales had disappeared and we canceled the sample from the record.

Q. The samples referred to in the Sample Advice of September 15th, Exhibit 3-E, were they taken after the hops had been baled or before?

A. After. They had to be baled, or we could not take the samples, but there were only a small number of bales made at that time.

Q. Will you refer to Exhibit 3-J?

A. Yes. 3-J is the original Sample Advice memorandum addressed to John I. Haas, Inc., Washington, D. C., under date of September 26th, in which they were advised that we were sending to them on that date 19 samples No. 51, representing 193 bales of Oregon clusters, Wellman contract hops, Code No. G-99-A, and also included another lot of hops, other than the Wellman clusters.

Q. Those 19 samples are so-called tenth-bale samples, are they?

A. Yes, sir; those were tenth-bale samples.

Q. Was each of those samples brought to your office by your field man?

A. It was not, no. They were sent to our office from the Salem office by express.

Q. They did not come through your Hillsboro office?

A. How is that?

(Testimony of Harold W. Ray.)

Q. Did you go into your Hillsboro office?

A. Yes, they were sent by express from Salem, from the Salem [126] office to the Hillsboro office.

Q. What was done with them at the Hillsboro office?

A. The hops were examined by myself and Mr. von der Werth, and they were split and approximately one-half of each of the 19 samples was forwarded by express to John I. Haas, Inc., marked as this exhibit indicates.

Q. That was approximately one-half of each sample, is that right? A. Yes.

Q. Were those samples returned later?

A. No, they were not. We never requested that they be returned.

Q. What are the samples you have in the courtroom now, that you have brought in?

A. Well, as I have just said, those are one-half of the samples, or approximately one-half of each of the original 19 inspection samples of the Wellman cluster hops.

Q. Referring again to Exhibit 3-J, I call your attention to the typewritten material towards the bottom of the page after the printed word "Note."

A. Yes.

Q. What is the meaning of that comment?

A. "These Wellman contract hops have been weighed, inspected and sampled preparatory to settlement but no basis has been reached. Please

(Testimony of Harold W. Ray.)

note these are tenth-bale samples on the clusters.”

I did not write that.

Q. Who did? [127]

A. Mrs. Townsend.

Q. She was in your Hillsboro office, is that right?

A. Yes.

Q. Do you know what it means?

A. I know what the intent was.

Q. Will you state the intent.

A. The intent was to advise them that we had inspected and sampled and weighed those Wellman hops, without committing ourselves or without committing John I. Haas, Inc., to the acceptance of the hops, in accordance with their instructions.

Mr. Kerr: Will Counsel stipulate that these samples which this witness has referred to as having been brought into court by him are marked Exhibits 11-A to 11-N?

Mr. Kester: If Counsel says that is the fact, we are willing to so stipulate.

Q. (By Mr. Kerr): The samples referred to are the ones on the window sill?

A. I don't know whether they are or not. I can't see them. They were over there. I presume that they are still there.

Q. Referring now to Exhibit 3-A,—

A. Yes.

Q. —what was the occasion for your sending that wire?

A. This wire was dated Hillsboro, August 13th,

(Testimony of Harold W. Ray.)

and addressed to John I. Haas, Inc., Washington, D. C., and it was the result of telephone information from our Salem office or, in other [128] words, from Mr. Noakes, stating that weather conditions were unfavorable and expressing doubt as to whether the Wellman and Stroda clusters would be harvested.

Q. Was that based upon some report? Was that based upon some report from your field man?

A. That was based upon a report from Mr. Noakes.

Q. Referring now to Exhibit 3-C,—

A. Yes.

Q. —is that a letter of instruction from John I. Haas, Inc., main office?

A. Well, wait until I read it, Mr. Kerr. Now, what is the question, please?

Q. I will withdraw the previous question. Was your company authorized to determine the amount of advances to be paid growers under prime contracts?

A. Yes. That was the general practice over many years, that we had the authority to handle those advances according to our judgment, and this particular letter apparently refers to—Wait.

We had previously wired them that Wellman might not have any cluster hops, and the next thing he knows we have paid Mr. Wellman harvesting advances and he probably wants to know why. This letter was from the Treasurer of the company.

(Testimony of Harold W. Ray.)

Q. Can you state why, in view of the previous reports you had made to the Washington office that Mr. Wellman probably would [129] have few, if any, clusters, you nevertheless made advances to him?

A. Yes, I can, because later Mr. Noakes advised me that he thought Mr. Wellman was going to have a harvest, that he would require some harvesting advances, he thought, and he inquired of me if it would be satisfactory to make them, and I told him that if Mr. Wellman was going to harvest some cluster hops and wanted an advance for him to advance a sum that in his judgment would be safe and proper.

Q. Do you know whether or not there was an advance to Mr. Wellman on his cluster hop crop for the amount of the advances referred to in the contract?

A. The full amount was not advanced on the cluster hops.

Q. Why not?

A. Because it was anticipated that the quantity and the crop would be materially reduced.

Q. Reduced by what?

A. By reason of mildew damage and disease, leaving a considerable portion of the crop unharvested.

Q. Was it your supposition at that time that a considerable portion of his crop would be left unharvested?

(Testimony of Harold W. Ray.)

A. It appeared to be very likely from the reports that I received.

Q. Did you have any discussion with him or did your office, to your knowledge, have any communication with Mr. Wellman? That is, [130] concerning the possibility of selective picking of the 1947 clusters?

A. I will answer that in this way: I will not answer definitely about that, but there was some talk about it, I understood. Mr. Noakes telephoned to me and asked me if John I. Haas, Inc., would be willing to pay Mr. Wellman an increased price over that indicated by the contract or, in other words, a premium over the market price if he could selectively pick the hops, so that they would keep out the mildewed hops.

I discussed the matter with John I. Haas, Inc., and it was their attitude that the market was sufficiently high and that any such cost as that should be borne by the grower entirely and that they would not be willing to increase the price for that purpose.

Q. Will you refer to Exhibit 3-D?

A. Yes.

Q. And particularly to the last paragraph?

A. Yes.

Q. Do you recall whether or not that was your first advice to the Washington office that there would be some Wellman clusters for delivery?

A. I believe that was the first written advice that we had given them, but I think Mr. John I.

(Testimony of Harold W. Ray.)

Haas was here in Portland late in August and I think I told him verbally that it appeared likely at that time that Wellman would pick at least a part of [131] his cluster hops, but I think that this, which is a letter dated September 10th, in which we reported to them that we were drawing a sight draft on them to cover advances made to several growers including \$5,000 for Mr. Wellman—I think that was the first written advice to their office by our concern that there would be some cluster hops.

Q. Will you refer now to Exhibit 3-F?

A. Yes. Do you want me to read this?

Q. I believe it is not necessary, but what is meant in that telegram about willingness to fix the price on clusters on a sliding-scale basis?

A. This contract stated—I might as well read that portion of it. It explains it better than I can. “In order to clarify matters regarding floor contracts, willing to fix price of clusters at 85 cents on sliding-scale basis.” That means a sliding scale for pickers.

Q. What is meant by “fix price”?

A. The contract provides, what we call open-end contracts—they give the grower the privilege of selecting a price between certain dates, which is supposed to represent the price of prime quality hops on the Oregon market as of that date, and if that price is higher than the floor price stated in the contract, that would be the price fixed for prime-quality hops in accordance with the terms

(Testimony of Harold W. Ray.)

of the contract. That means the grower selects a certain price as of a certain date. If we agree that that was the price on that date for a prime-quality hop, we confirm that to the grower. That fixing of a price does not mean that they agree to take hops if they are not up to the contract specifications of quality.

Q. With respect specifically to the Wellman cluster contract, there was no sliding-scale basis figured in the contract?

A. No, there wasn't.

Q. What was the buyer willing to accept as the grower's market price for a particular date the price for hops of contract quality with the particular leaf-and-stem content——

A. That is a rather difficult question to understand.

Q. Then, will you explain what was meant by the reference in this wire to fixing the price of clusters on a sliding-scale basis?

A. It meant that they were willing to confirm to the growers who selected 85 cents as the market price during a certain period for prime-quality cluster hops, 1947 crop, that they were willing to confirm that price, but the hops must be of the kind and quality specified in the contract. That is exactly what it meant. In other words, they were not saying, "We will take these hops at 85 cents a pound sliding scale if they are not up to contract." They would not agree to that.

(Testimony of Harold W. Ray.)

Q. Did it mean if the grower's hops came up to a pick of 20 per cent that the hops would be accepted?

A. Certainly not. That had nothing to do with saying that they [133] were going to take the hops. It simply confirmed that that was the market price on that day for a prime-quality hop. If they had prime-quality hops, that would be the price. If they did not have prime-quality hops they might not even take them at all. That 85-cent sliding scale was the market price as of those dates.

Q. For what percentage of pick?

A. For prime-quality hops.

Q. What percentage of pick?

A. Based on 8-per cent picking. If the grower had a 6-per cent pick, he would have obtained a premium of 2 cents a pound over the 85 cents.

Q. If he had an 11-per cent pick, what was he entitled to?

A. If he had an 11-per cent pick, they would not be a cleanly picked hop and they would not have accepted them.

Q. That is the meaning of this wire, as you understand it?

A. It was.

Q. Now, I refer you to Exhibit 3-G.

A. Yes.

Q. Do you recall the meaning of the first sentence?

A. You mean the first line of the telegram?

Q. Yes.

(Testimony of Harold W. Ray.)

A. It says: "Other growers position no discount for poor quality ridiculous."

I don't know exactly what it means. I can't recall [134] exactly what it means, but naturally I think that it means that on that date, either in a telephone conversation or in some manner, I told them that some growers were saying that they could deliver what we can call poor quality without a discount, and they say in this telegram, "Other growers position no discount for poor quality ridiculous."

Q. Will you refer to Exhibit 3-I.

A. Yes. Do you want me to read it?

Q. No, that is not necessary. Was that confirmation of the receipt by you of instructions of John I. Haas, Inc., not to weigh or inspect hops without an understanding with the growers that this would not constitute acceptance of the hops?

A. Yes. This was advice that we should attempt to proceed upon that basis.

Q. Exhibit 3-H, is that a memorandum of the wire which appears as Exhibit 3-I?

A. Correct, yes.

Q. A decoding of the wire that appears in Exhibit 3-I?

A. I would personally guarantee it as being a correct decoding. I have the code book, if it is necessary to refer to it. The telegram, which is Exhibit 3-I, is properly decoded. You want me to read the decoding?

(Testimony of Harold W. Ray.)

Q. Yes, if you will, please.

A. "Retel date will attempt proceed inspect sample and weigh all floor and high-priced contracts with distinct understanding [135] with growers this does not constitute acceptance of hops. Will send inspection sample as fast as possible. What shall we do regarding 40 to 50-cent fixed on sliding-scale contracts? Do not think it advisable try make additional settlements until they are definite and final."

When I refer to "final" or to "settlements," I mean it is not a settlement but it is a price, a market price determined on confirmation. We had previously been more or less soliciting growers to fix that price, and in this telegram say, "Do not think it advisable try make additional settlements until they are definite and final."

"Having seen the hops might jeopardize our position. If growers demand settlement, will settle tentatively subject quality condition contract."

Q. Again, where you refer to "settlement" you mean the agreement as to what it was?

A. That is exactly what I mean. It was a determination of that open-end contract price.

"Will follow your instructions regarding payment growers. Believe Steiner also acting with caution on high contracts."

That is the decoding of that exhibit, No. 3-I.

Q. Prior to the date of that telegram, had you been directed by John I. Haas, Inc., to obtain from

(Testimony of Harold W. Ray.)

each grower whose hops you were going to sample, inspect and weigh an understanding [136] that such would not constitute acceptance of those hops?

(Question read.)

A. I had received such instructions, yes, prior to this, and this was the confirmation. I said we would attempt to do so.

Q. Did you examine the samples of the Wellman clusters when they were delivered to your Hillsboro office? A. Yes, I did.

Q. Did you personally examine each sample?

A. I did, yes.

Q. Do you recall the appearance and condition of these samples at that time?

A. Yes, in a general way. There are no marks of identification as between the samples. In other words, the samples are not numbered Bale So-and-So or Bale So-and-So. There are just 19 samples which were drawn from tenth-bales in the crop, but I can remember as a whole exactly what the hops were like, in my opinion.

Q. Will you state what the appearance and condition of those samples was at that time?

A. Yes. The hops were, first, dirty picked, very dirty picked. They were damaged with mildew principally by the content of brown mildewed nubbins in the hops. The fully developed cones were not so badly marked. The hops were of green color. There were large flaky portions, and, in my opinion, they were not well [137] filled with lupulin. The

(Testimony of Harold W. Ray.)

damage in appearance by reason of the picking and by reason of the large content of brown nubbins made the samples or the hops themselves very undesirable hops on the basis of eye inspection.

Q. You advised John I. Haas, Inc., of your opinion of these hops at that time, did you?

A. I think I wrote a letter explaining my opinion, and I might say in writing those letters to them we were attempting to assist the grower as much as possible. I was not trying to make them look worse than they were. I wanted to try to help them a little, if I could.

Q. Would you say you were inclined to give the grower the benefit of any doubt?

A. I was trying to be of assistance to the grower. The growers are our customers. Our income depends upon the growers, and we wanted to serve the growers to the best of our ability.

Q. Was it at any time your opinion and your judgment that those samples shoed prime-quality hops?

A. You would have to state that question differently, Mr. Kerr, before I will care to answer it.

Q. When you first viewed those samples, was it your opinion at that time they were of prime quality?

A. It was not my opinion that they were of prime quality, but with reference to your former question there might be, in fact, prime-quality hops

(Testimony of Harold W. Ray.)

in the sample; but, as a whole, they were not [138] prime quality.

Q. Do you recall any one of the individual samples which did come up to prime quality?

A. There was no one sample that came up to a prime-quality hop.

Q. Did those samples indicate a failure to cleanly pick? A. They were dirty picked.

Q. What, in your opinion, constitutes, in value of percentage, a dirty picked hop?

A. In my opinion, a hop must be 6 per cent to be cleanly picked, a cleanly picked hop, and anything over that would be a dirty picked hop; but the trade practice in 1947 was 8 per cent, which was considered medium—whether it went up or down, 8 per cent was called a cleanly picked hop for the purpose of the sliding scale, and the grading of the price up or down.

(Recess.)

Q. (By Mr. Kerr): Is it your judgment anything over 8 per cent—anything over 6 per cent is a dirty picked hop?

A. That is my judgment, as I stated, in previous years. In 1947 it was the general practice that 8 per cent was considered the limitation of a cleanly picked hop. Anything above 8 per cent would have been dirty picking.

Q. There will be handed to you now Exhibits 8, 7, 5 and 6——

The Court: Bring them here.

(Testimony of Harold W. Ray.)

Q. (By Mr. Kerr): When these are handed to you, will you please [139] examine them and state whether or not the words and figures which appear thereon, in pencil or in ink above the typewritten words or figures are the correct decodings of the particular words involved?

The Court: Who wrote the words on there?

A. Different persons; someone in my office. I will guarantee the decodings of the messages, that they are correct, all of them.

Q. (By Mr. Kerr): Do you find there instructions to you to obtain from growers an understanding, or understandings or agreements that your weighing of the hops will not constitute an acceptance of those hops?

A. Are you going to refer to a particular exhibit?

Q. There is a telegram there, is there not, that refers to your obtaining understandings with growers concerning the weighing-in of their hops?

A. Yes, there is. That is marked Exhibit No. 5, I think.

Q. Is that the instruction you referred to in your previous testimony?

A. It undoubtedly is, yes. Yes, it is.

Q. Do you recall whether or not you had any telephone conversation with anyone in the Washington office on that subject, up to the time of that telegram?

Mr. Kester. What is the date?

(Testimony of Harold W. Ray.)

A. The date is September 25th. I cannot answer that for certain, [140] Mr. Kerr. It may be. We have frequent telephone conversations with the Washington office, and it is very probable that we had, but I can't say definitely as of approximately this date. Do you wish a portion of this telegram read?

Mr. Kerr: No, that is not necessary.

Q. You are being handed Exhibit 3-U.

A. Yes.

Q. Who made the notations in the lower part of that exhibit, in the right-hand corner, if you know?

A. By the writing I know it was Mrs. Townsend.

Q. Do you remember having seen that letter when it came into the office? A. Yes.

Q. Does that letter contain instructions to you relative to the rejection of the Wellman clusters? Will you hand it to the Judge?

The Court: Finish your answer first.

A. Yes, it is what I would say a tentative order in connection with the rejection of the Wellman clusters.

Q. (By Mr. Kerr): Do you recall what you did when you received that letter; that is, what your action was with respect to the rejection of the Wellman clusters?

A. I want to look at it again before I answer that question.

The Court: Yes.

(Testimony of Harold W. Ray.)

A. I called up Mr. Noakes at the Salem office and informed him [141] of this letter. They had previously instructed us to take over the Wellman fuggle hops, that they would accept those on the contract. The Salem office advised that Mr. Wellman was away and that they could not reach him and could not accomplish that duty but would contact him as soon as he returned.

Q. Did you give Mr. Noakes any instructions relative to communicating this objection to Mr. Wellman?

A. Yes, I did. I certainly did.

Q. What were your instructions?

A. I instructed him to accept the Wellman fuggle hops, to reject the Wellman cluster hops, to pay Mr. Wellman for the fuggle hops and deduct the entire advances from the proceeds of the fuggle hops.

Q. Were those advances on both clusters and fuggles?

A. Yes, on both fuggles and clusters.

Q. What did Mr. Noakes tell you? Did he state he would carry out the instructions, or was there any comment made by him at that time?

A. He said he would do so. In all the years he has been with me I have never known him to fail to carry out any instructions I gave him.

Q. Do you definitely now recall having given him those instructions?

A. I do, sir. [142]

Q. How were they communicated to Mr. Noakes?

(Testimony of Harold W. Ray.)

A. I not only gave him those instructions once, but I talked with him about it several times.

Q. Do you recall how you communicated your original instructions to him?

A. By telephone.

Q. Referring to Exhibit 3-V—— A. 3-V?

Q. Yes. A. Yes.

Q. —whose signature appears on that letter?

A. There isn't anybody's signature on this copy, but I signed it. It has my initials. I dictated the letter and no doubt signed it.

Q. What is the date of that letter?

A. October 22, 1947.

Q. What is that letter?

A. That is a letter to John I. Haas & Co.—John I. Haas Co., Inc., to the attention of Mr. Walter Rauber. Mr. Rauber is Vice-President and General Office Manager of John I. Haas, Inc., Washington, D. C. It states: "Referring to the Wellman contract, Mr. Wellman is still away and is expected to return this Friday night, October 24th, and we will contact him the following day if possible and make settlement by taking over the fuggles and rejecting the clusters. Howard Eismann of Steiner's has informed [143] us that they will accept these fuggles as part delivery on the thousand-bale deal." That refers to something else. I would like to explain that.

Q. Very well. Proceed.

A. John I. Haas, Inc., had 1,000 bales of fuggles

(Testimony of Harold W. Ray.)

sold to Anheuser-Busch Brewing Company, St. Louis, and, shortly before harvest time Anheuser-Busch sold these 1,000 bales of fuggle hops to S. S. Steiner & Co., in which there was a trade for imported hops. In other words, Steiner & Co. were supplying them with a quantity of imported hops and, in return for them, Anheuser-Busch was selling to Steiner this 1,000-bale lot of fuggles that John I. Haas, Inc., had sold to them.

We were instructed by John I. Haas, Inc., upon request of Anheuser-Busch Brewing Company, that we make delivery of this 1,000-bale lot of hops here in Oregon to a representative of S. S. Steiner & Co., so that Steiner and Haas have had nothing to do with each other in the field.

Q. Did you receive any report from Mr. Noakes relative to his carrying out your instructions to reject the Wellman clusters?

A. Prior to that time or——

Q. At any time thereafter.

A. When I gave him the instructions to do so, he confirmed to me that he would do so.

Q. Did he later report that he had done so?

A. He later reported that he had done so. [144]

Q. Do you recall when that was?

A. May I refer again to the notes?

Q. Yes.

A. He reported to me the evening after dinner on October 28th that he had accepted Wellman's fuggle hops, that he had rejected his cluster hops,

(Testimony of Harold W. Ray.)

and that he had paid him for the fuggles and had deducted all the advances on both the fuggle and cluster hops in making payment and had given Mr. Wellman a check for \$842.20 balance.

Q. Mr. Noakes was authorized to draw checks on the A. J. Ray & Son account, was he?

A. Yes.

Q. Did you receive another or a subsequent letter from John I. Haas, Inc., confirming their previous instructions to reject the Wellman clusters? I refer you to Exhibit 3-W. Is that the letter of October 30th?

A. October 30th, that letter is signed.

Q. Yes. I invite your attention to the third page thereof.

A. Yes, on the third page. That letter deals with quite a large number of different growers' contracts.

On the third page it says: "Wellman, Sample No. 51: We confirm our instructions to reject these hops. They are extremely poor, and the picking is certainly dirtier than the 11 per cent indicated on the official analysis. Inasmuch as we got our advances back by taking over his fuggles, we are [145] in the clear on this rejection."

Q. That was respecting Mr. Noakes' report that he had carried out your instructions to reject the Wellman clusters. Did you report that in turn to John I. Haas, Inc.?

A. Yes, we did.

Q. Will you refer to Exhibit 3-Y?

A. Yes.

(Testimony of Harold W. Ray.)

Q. That is dated when?

A. A letter of November 1, 1947.

Q. Whose signature appears on that letter?

A. Mrs. A. L. Townsend's signature.

Q. Is that the Mrs. Townsend previously identified with your organization? A. It is.

Q. Is she now in your organization?

A. She is. She is present in the courtroom.

The Court: Would you like to adjourn until Monday afternoon or Tuesday morning?

(Discussion off the record.)

The Court: Tuesday morning at 10:00 o'clock, then.

(Thereupon an adjournment was taken until 10:00 o'clock a.m., Tuesday, February 1, 1949.)

10:00 o'Clock A.M., Tuesday, February 1, 1949

HAROLD W. RAY

a witness in behalf of Defendant, having been previously duly sworn, thereupon resumed the stand and was further examined and testified as follows:

Mr. Kerr: If the Court please, your Honor will recall last week—I believe it was on Thursday—I stated that the defendant desired to have one of the officers of the defendant organization here as a witness. Last evening I received the following telegram addressed to me by John I. Haas, Inc.:

“We regret none of our officers have been able to reach Portland in order to testify in the current court proceeding. Mr. Robert was booked for air

(Testimony of Harold W. Ray.)

passage Thursday, Friday and Saturday and, due to weather complications in the East, all flights were canceled. His flight for Sunday, January 30th, to Portland, was canceled because of the death of his brother."

I understand his brother was an officer in the Navy and was killed in an accident.

"Is it possible to arrange postponement to secure deposition here," and so on. We do not suggest a deposition but, if it would meet with the Court's pleasure, we would like to continue the case, after the conclusion of our [147] testimony this afternoon, to Friday, when we will be able to put Mr. Rauber on the stand. I do not state, your Honor, that Mr. Rauber's testimony is essential. However, I believe it would be helpful. He would testify as to the examination of the hop samples in the Washington, D. C., office.

The Court: You would not object to that, would you?

Mr. Kester: Whatever the Court wishes. I would like to know a little bit about what they expect to prove by him.

The Court: Did you catch what he just said?

Mr. Kester: Is that all?

Mr. Kerr: And also as to the authority of A. J. Ray & Son to act for the defendant in this transaction, specifically with respect to the rejection of the hops.

(Testimony of Harold W. Ray.)

The Court: We have a hearing Saturday morning, Mr. Kerr.

Mr. Kerr: We plan on having our argument immediately following that testimony.

The Court: As I said before, it does not make any difference to me. You can go ahead this week and argue your case. I would rather that you settled that between you as to when you want to argue.

Mr. Kester: I would only make this observation——

The Court: Let's don't start to postpone it until we get through with what we have immediately before us. Let us hear the testimony we have. [148]

Direct Examination—(Continued)

By Mr. Kerr:

Q. There has been handed to you by the Bailiff Exhibit 12. Can you tell from an examination of that who typed the letter? A. Yes.

Q. Who was that?

A. Miss Catherine Matheson.

Q. She is the stenographer in your office you previously identified? A. Yes.

Q. Was such a letter sent to Mr. Wellman?

A. No, it was not.

Q. Why not?

A. Because my instructions from John I. Haas, Inc., to send out such a letter were not received until the day that Mr. Noakes and his assistants were to inspect and sample the Wellman hops. Mr. Wellman had requested that they do the inspecting

(Testimony of Harold W. Ray.)

and sampling promptly in order that he might go hunting, and this letter was not mailed out until the evening of the day that Mr. Wellman's hops had been inspected.

Q. What instructions did you give to Mr. Noakes relative to the sampling and inspecting and weighing of Mr. Wellman's cluster hops?

A. Due to the fact that I realized the importance of the matter and that these letters had not been mailed out, I instructed [149] Mr. Noakes very specifically and definitely that before he could inspect the samples or weigh Mr. Wellman's hops that he positively must have an understanding and agreement with Mr. Wellman that would permit us to do that without it constituting an acceptance of the hops on the contract, because we had no authority to accept hops from John I. Haas, Inc., and would have to submit these tenth-bale samples for their inspection and their decision as to what to do with them.

Q. By "their inspection and their decision" you mean whose inspection and whose decision?

A. John I. Haas, Inc.

Q. Located where?

A. In Washington, D. C.

Q. When did you first give such instructions to Mr. Noakes?

A. I gave these instructions to Mr. Noakes several times prior to the date that they actually inspected the hops. I did not only give them in

(Testimony of Harold W. Ray.)

connection with Mr. Wellman's particularly but any other cases that might arise, that under no circumstances were they to inspect, sample or weigh any of the contract hops without an understanding with them that that did not constitute an acceptance, because we did not have the authority to accept.

Q. By "understanding" you mean an understanding with whom?

A. With the various growers. Mr. Wellman, I am speaking of at the moment, but I also gave Mr. Noakes these instructions with respect to any other growers who had requested inspection [150] of their hops.

The Court: There is a lot in this case about apparent authority. Inasmuch as we are not trying it under a pre-trial order, I don't know whether that question needs to be explained or not. I mention it to you for whatever value it may strike you as having.

Q. (By Mr. Kerr): Did you also give such instructions to Mr. Noakes specifically with reference to the Wellman cluster hops? A. I did, yes.

Q. How were those instructions communicated to Mr. Noakes? A. By telephone.

Q. From where?

A. From my office and also from my home. During the active season, the hop season, I talked with Mr. Noakes almost every evening after dinner, after the field men were in from the country, and he

(Testimony of Harold W. Ray.)

again reported to me what transpired during the day. That is in addition to the frequent telephone conversations during the day that I had with Mr. Noakes in the Salem office.

Q. Was there any one of these conversations with Mr. Noakes relative to the weighing of the Wellman clusters during office hours in your office?

A. Yes, lots of them; not only once but several times.

Q. What report did you get from Mr. Noakes relative to his [151] carrying out those instructions?

A. On the night of September 25th he reported to me that he had inspected and sampled and weighed Mr. Wellman's hops, both fuggles and clusters, with the express understanding and agreement with Mr. Wellman that he understood that that did not constitute an acceptance of these hops, and that he permitted us to inspect, weigh and sample them upon that basis.

Q. On September 25th did you know what the official analysis of the leaf-and-stem content of the Wellman clusters revealed?

A. No, I didn't. I understand that the State inspection service or the State and Federal services drew samples from the bales at the same time or on the same day that Mr. Noakes and his assistants were inspecting the hops.

The Court: There isn't any evidence in the case by way of explanation, as yet, as to what the State requirements are. I do not know to what extent the State acted in this case.

(Testimony of Harold W. Ray.)

Mr. Kerr: Yes.

Q. Mr. Ray, can you explain the nature of that determination by the Government officials of the leaf-and-stem content of hops in Oregon? How was that determined?

(Question read.)

A. There has been a custom since the advent of the OPA ceiling prices on hops to have an official analysis of every lot of hops grown on the Pacific Coast, to determine the percentage of extraneous matter, which consists principally of stems and [152] leaves, and also the percentage of seed, because a great many contracts are for seedless or semi-seedless hops, so that the analysis is necessary, and during the period of the OPA the ceiling price was based upon the extraneous matter content of the hops.

Q. (By Mr. Kerr): What do you mean by extraneous content?

A. It means leaves and stems or any other foreign matter that might be in the hops that should not be there.

After the expiration of the OPA ceiling prices, the trade was favorable to having that practice of official analyses continued, and all contracts, I believe, provide that the determination of the picking,—that is, the leaf-and-stem content,—and also the determination of the seed content of the hops shall be decided by this inspection, which is a joint

(Testimony of Harold W. Ray.)

United States Department of Agriculture and Oregon State Department of Agriculture proceeding.

Q. That analysis of leaf, stem and seed content of hops developed as a result of OPA?

A. Yes, it did.

Q. When was the first analysis made?

A. I believe, Mr. Kerr, that it was the season of 1944, the 1944 crop year. I have not checked my records to refresh my memory, but I believe that was the first year of the OPA ceiling prices.

Q. In 1947 was it the custom in the hop trade to accept that [153] determination by the Federal and State inspection services of leaf, stem and seed content? A. Yes, it was.

Q. Do you know whether or not that is the United States Department of Agriculture, Production and Marketing Administration?

A. They have charge of that inspection service but, as I understand it, the actual work of making those determinations, at least here in Oregon, is carried on by the State of Oregon Department of Agriculture, but under the jurisdiction, and otherwise of the U.S.D.A.

Q. Do you know what gentleman is in charge of that, the name of the gentleman?

A. I believe Mr. Whitlock. He is with the United States Department of Agriculture and is chief of this inspection division, I believe.

Q. Is that the Mr. Whitlock who testified in a previous case here? A. Yes.

(Testimony of Harold W. Ray.)

Q. The Bailiff will hand you Exhibit 13. Do you know the method followed by the Government men in taking samples for that inspection or analysis?

A. I knew the general method.

Q. Will you refer to the exhibit which has been handed to you, which bears the printed heading of the United States Department of Agriculture—

A. Yes.

Q. —and state whether or not that is the type of certificate which is made out by the Government officials relative to their determination of the leaf, seed and stem content? A. Yes, it is.

Q. That is Exhibit what?

A. Exhibit—looks like Exhibit No. 1.

Q. Exhibit No. 1, is it not? A. Yes.

Q. Is that the certificate which relates to the Wellman 1947 cluster hops?

A. That is correct. It does not state Mr. Wellman's name.

Q. How can you determine whether or not that is Mr. Wellman's?

A. Because this inspection service allots to each grower in the state a code number, and Mr. Wellman's code number for cluster hops is G-99-A.

Mr. Kester: We will agree that the certificate relates to Mr. Wellman's hops.

Mr. Kerr: Very well.

A. This is the original certificate.

Q. This extraneous matter you refer to as being reported by the certificate, as a result of the Gov-

(Testimony of Harold W. Ray.)

ernment analysis, does that include such matter as nubbins or blighted hops?

A. No, it does not include that. That is my understanding, that it does not. [155]

Q. To your knowledge, does the United States Department of Agriculture issue reports on leaf, stem and seed content of hops in each season, as determined by their analyses?

A. Yes, they do, in their market reports.

Q. Will you refer to the telegram that was previously handed to you, Mr. Ray——

A. Yes.

Q. That is Exhibit what? A. Exhibit 3-O.

Q. 3-O? A. Yes.

Q. You refer there to the Wellman hops, do you not? A. Yes, I do.

Q. Will you read the specific reference to the Wellman clusters, 1947 hops?

A. It is dated October 4, 1947, and the reference to the Wellman hops is: "We inspected Wellman fuggle clusters without commitments. Forwarded inspection samples twenty-sixth."

This was apparently in answer to a telegram or inquiry as to whether or not this had been done.

Q. What is meant by the term "without commitments"? What is meant by that term, as used in that telegram?

A. Without committing J. I. Haas, Inc., to the acceptance of those clusters with the fuggle hops. In other words, this was the form that we used in wiring John I. Haas, Inc., that we had [156] in-

(Testimony of Harold W. Ray.)

spected the samples and weighed these hops, without agreeing to accept them on the contract.

Q. Thereafter did you give Mr. Noakes instructions to reject the 1947 Wellman clusters?

A. I did. I can't state the exact date, Mr. Kerr. I think I gave him the instructions immediately following the receipt of instructions to me from John I. Haas, Inc. I believe you have an exhibit there——

Q. The Bailiff will hand you Exhibit 3-U. I will ask you if those are the instructions from John I. Haas, Inc., that you refer to?

A. That is one of several letters or telegrams instructing me to reject the Wellman cluster hops. This one is dated October 18th. There were others.

Q. How did you notify Mr. Noakes of these instructions to reject the Wellman clusters?

A. I notified him by telephone.

Q. Did you give him such instructions more than once?

A. Yes. I gave them to him a number of times because at the time we received instructions from John I. Haas, Inc., to accept the clusters and fuggle hops—to accept the fuggle hops and to reject Mr. Wellman's cluster hops, I telephoned immediately to Mr. Noakes, relaying those instructions to him, and he informed me Mr. Wellman was away.

Therefore, there was a lapse there of, I should say, [157] at least ten days between the time that we received the instructions to reject and the time

(Testimony of Harold W. Ray.)

that Mr. Wellman returned, so that we could get in touch with him to inform him, and during that period I talked with Mr. Noakes almost every day about the matter, asking if Mr. Wellman had returned and if he had accepted the fuggle hops and rejected the cluster hops. I suppose I talked to him six or eight times, between the time I first gave him the instructions and the time it was actually done.

Q. How were those conversations held?

A. They were all telephone conversations. Some were from my office and some from my home.

Q. Were the conversations referred to as having been from your office during office hours?

A. Yes.

Q. Did you say to Mr. Noakes why the cluster hops had been rejected?

A. Yes. I told him John I. Haas, Inc., reported to me that the quality of the hops was so poor that they could not get any of their customers to accept them.

Q. Did you tell him that was the reason for the rejection?

A. Yes. I told him that is what John I. Haas, Inc., complained of as the reason they could not accept them, because I asked him to tell Mr. Wellman.

Q. What instructions did you give to Mr. Noakes at that time relative to the fuggle hops? [158]

A. I told him that John I. Haas, Inc., would accept the fuggle hops on the contract at the price that

(Testimony of Harold W. Ray.)

had been agreed upon as the market price for the fuggle hops, which was 90 cents a pound at that time.

Q. Did you give Mr. Noakes any instructions concerning paying for the fuggles?

A. Yes, I did. I told him to pay for the fuggles and to deduct all the advances from the proceeds, the advances on both fuggles and clusters, both contracts.

Q. There will be handed to you Exhibit 3-V. Will you state whether or not you dictated that letter?

A. Yes, I did.

Q. To whom?

A. Oh, wait a minute. Addressed to whom?

Q. No; to whom did you dictate it?

A. To Miss Matheson.

Q. Do you know if the original was typed by Miss Matheson? A. Yes.

Q. Will you read to the Court that portion of the letter relating to the delay in contacting Mr. Wellman?

A. Yes. It is dated October 22nd and addressed to John I. Haas, Inc., Attention Mr. Walter Rauber.

“Referring to the Wellman contract, Mr. Wellman is still away and is expected to return this Friday night, October 24th, and we will contact him the following day if [159] possible and make settlement by taking over the fuggles and rejecting the clusters.”

Q. What was the source of that information that

(Testimony of Harold W. Ray.)

Mr. Wellman was away, as reported by you in that letter?

A. A conversation with Mr. Noakes.

Q. What had Mr. Noakes reported to you in that regard?

A. He reported to me Mr. Wellman was away, and he had been instructed to accept the fuggles and reject the cluster hops, and he reported to me that Mr. Wellman was away and he was unable to do so until he returned, and that he expected him to return Friday night, the 24th of October.

He did not tell me that in the first place. He did not know when he was going to return, but just prior to this, prior to October 22nd, he told me he thought he would be returning on the 24th.

Q. When did Mr. Noakes report to you concerning his rejection of the clusters?

A. He reported to me the night of, I believe it was, October 28th.

Q. What did he report to you at that time?

A. He reported to me that he had accepted Mr. Wellman's fuggle hops and he had rejected his cluster hops, I think, the day before, and in payment he had deducted all the advances on both the fuggles and clusters and given Mr. Wellman a check for the balance due him. [160]

Q. Do you recall how that report was made? Was it made in writing or over the telephone or in some other manner?

A. Over the telephone.

(Testimony of Harold W. Ray.)

Q. Was it made to you at your office?

A. There is practically no written correspondence between the Salem office and myself. Occasionally we did record some matters.

Q. There will be handed you Exhibit 3-Q. Will you examine that exhibit and inform the Court what it is?

A. Yes. It is a letter dated October 7th, which I dictated, and we wrote John I. Haas, Inc., Attention Mr. Walter Rauber:

“We refer to your letter of October 3rd, the third paragraph of which requests us to send you a list of your contract growers——”

Q. State what the information is that you have set forth in that letter.

A. The information lists several of our contract growers who had not been dealt with as of the date of October 7th.

Q. What do you mean, “had not been dealt with”?

A. Whose hops had not been inspected or weighed as of the date of October 7th. I can't say for certain whether there were any accepted before or not, but it gives a list of the growers, the contract growers and the date upon which they notified us of the price and the date that they had chosen for the market price of the contract. [161]

Q. Are Mr. Wellman's cluster hops listed in that letter?

A. Yes, his fuggles and clusters both are listed

(Testimony of Harold W. Ray.)

here, showing that on the fuggle hops he had selected a price of 90 cents and on the cluster hops he had selected a price of 85 cents, which was the going price of prime-quality fuggle and prime-quality cluster hops, as of that date. That was September 25th.

Q. Will you read the portion of the letter that explains the meaning of the listing of the growers' names?

A. "We list below the growers in the order in which the contracts were written. We are not including in this list lots that have been taken over."

We had taken over some of the contract hops prior to this letter, October 3rd.

Q. Was the purpose of that letter to report to John I. Haas, Inc., generally as to the hops referred to in that letter?

A. That was one of the purposes, but the chief purpose, Mr. Kerr, was to tell them the dates and the prices that the contract growers had selected as the market price in connection with their contracts.

Q. Did you talk with Mr. Wellman after Mr. Noakes reported that he had rejected the Wellman cluster hops?

A. Yes, I did, sometime subsequent to that. I think slightly over a month afterwards I talked to Mr. Wellman for the first time.

Q. Do you recall the date that you first talked to Mr. Wellman [162] after the rejection of the cluster hops?

(Testimony of Harold W. Ray.)

A. I can't recall the exact date. I think it was the first few days in December, but I couldn't say which date.

Q. Where did you hold that talk?

A. In my office, in Hillsboro.

Q. Was that during office hours? A. Yes.

Q. Was anyone with Mr. Wellman when he came to your office? A. No, there wasn't.

Q. What was the conversation with Mr. Wellman, if you remember?

A. Well, a great deal of the conversation was just visiting, just immaterial, but I think he called upon me particularly to ask me if I thought there was any likelihood of John I. Haas, Inc., finding a market for his hops.

Q. Which hops?

A. His cluster hops, and Mr. Wellman naturally was anxious and desirous of disposing of them, and he inquired of me if I thought there was any likelihood that John I. Haas, Inc., would be able to find a market for them, and I told him that we would try to do so—that they tried to do so but they had not been successful as yet, and that it was very difficult to do.

I also told Mr. Wellman that A. J. Ray & Son would attempt to find a buyer for the hops, and I told him I would use every effort myself to find a buyer for his hops.

He also asked me in that visit if I thought there was [163] any chance that John I. Haas, Inc., would

(Testimony of Harold W. Ray.)

make some sort of a cash settlement with him, whereby they would stand some of the loss. I told him I didn't think there was a chance that they would, and he inquired of me—he had a contract also with S. S. Steiner & Co. for the other half of his crop, and he inquired of me that if Steiner should make a settlement with him did I think that John I. Haas, Inc., would then do so, and I then told him I didn't think that they would, but it might possibly influence them.

Q. Did Mr. Wellman at that time make any reference to Mr. Noakes?

A. Yes, he did. He explained to me the details of his contract with S. S. Steiner & Co., and he appeared to be of the opinion that they had handled some of the details in connection with their contract differently than Mr. Noakes had, and he said Mr. Noakes had been strictly aboveboard and had not allowed him to believe anything that was not the case, that he at no time had led him to believe that the hops would be acceptable, that the cluster hops would be acceptable under the contract, even prior to the time that he harvested the yard.

Q. Do you recall Mr. Wellman at that time specifically stating that at no time Mr. Noakes had allowed him to believe that the cluster hops would be acceptable under the contract?

A. Yes, I do, certainly.

Q. And this was the contract with John I. Haas, Inc.? [164]

A. Yes.

(Testimony of Harold W. Ray.)

Q. At that time did Mr. Wellman make any demand upon you for any money? A. No.

Q. Did he at that time ask for payment for his cluster hops?

A. Why, no; of course, he didn't. His cluster hops had been rejected, and we had settled with Mr. Wellman.

Q. What do you mean you had "settled with Mr. Wellman"?

A. We had paid him for the fuggle hops and had deducted the advances that had been made on the cluster hops and the cluster hops had been rejected.

Q. Did Mr. Wellman, during that conversation, ask you why he had not received any more money?

A. No.

Q. Did you have any subsequent conversation with Mr. Wellman relative to his cluster hops, in 1947?

A. I had several subsequent conversations with Mr. Wellman. Mr. Wellman and Mr. Kever together called upon me several times subsequent to the first visit by Mr. Wellman.

The matter discussed was practically identical with what we discussed at the first meeting. Each time Mr. Wellman inquired of me if John I. Haas, Inc., had reported any progress in finding a market for his hops, and I had to inform him each time that they had been unable to do so.

I told Mr. Wellman in the first conversation, when he [165] first called, that I felt that dealers had a

(Testimony of **Harold W. Ray.**)

moral obligation to try to find a home for these hops that had been rejected; although it was not a legal obligation, I felt that we had owed him a moral obligation, and John I. Haas, Inc., admitted it to me—they said they felt the same way about it, and they were doing everything they possibly could to find a buyer for Mr. Wellman's cluster hops.

Q. Will you explain that reference to a moral obligation. What do you mean by a moral obligation?

A. I mean that Mr. Wellman had been a customer of John I. Haas, Inc., and A. J. Ray & Son for quite a long period of time, off and on—not every year but many years, and that in a year when a disaster occurred, such as 1947, in the hop business, whereby it became necessary for dealers to reject some of the hops, I felt that a dealer had a moral obligation to do everything in his power to find a market for those rejected hops, in order to assist the grower as much as he possibly could, and I told John I. Haas, Inc., exactly the same thing, and they agreed.

Q. Were warehouse receipts applicable to or covering the 1947 Wellman cluster hops ever offered or tendered to you by Mr. Wellman? **A.** No.

Q. Or by anyone else? **A.** No. [166]

Q. Have you ever seen those warehouse receipts?

A. For the late cluster hops, no.

Q. Were any loading checks covering these hops ever tendered to you or offered by Mr. Wellman?

(Testimony of Harold W. Ray.)

A. No.

Q. Or by anyone else? A. No.

Q. Did Ray & Son pay any warehouse charges on the Wellman late cluster hops, 1947?

A. Not to my knowledge. That is a question I probably would not know about, Mr. Kerr. That is a detail that would be handled in the office or by Mr. Noakes in the Salem office, and not to my knowledge; but I could not say that they did not do it. I wouldn't say that.

Q. Do you know whether or not John I. Haas, Inc., ever paid any warehouse charges on the late clusters?

A. I am certain that they did not.

Q. Did A. J. Ray & Son, to your knowledge, ever take out any insurance on those late cluster hops of Mr. Wellman's?

A. No, not on the late cluster hops. We did take insurance coverage on the clusters—on the fuggles, I mean to say. After they had been accepted and paid for, we then insured them.

Q. Do you know how the records in your office are maintained or reported or recorded with respect to insurance coverage on hops that you have taken over or accepted? [167]

A. Yes, approximately. We have a blanket insurance policy which provides—it is provided by our insurance brokers. Hops are insured in the name of John I. Haas, Inc., and it is a 30-day reporting system of insurance, whereby my office enters any

(Testimony of Harold W. Ray.)

hops that are insured from day to day, and once a month they make a report of the additions and cancellations during that 30-day period, and I think the premiums are based upon the daily balance of insurance in force.

Q. Were the Wellman cluster hops ever reported to the insurer you have mentioned as being covered by this blanket policy? A. No, they were not.

Q. Why not?

A. Because we never took the Wellman hops. We rejected them.

Q. Who in your office has charge of these records relating to insurance coverage?

A. Mrs. Townsend has charge of that, but she may have the assistance of Miss Matheson in operating it.

Q. You have examined, have you not, samples of the Killian Smith hops and samples of the Geschwill hops in connection with the trial of the two previous cases in this court? A. Yes, I did.

Q. Will you state to the Court your comparison of the samples of the Wellman late cluster hops that you have seen and the samples of the Killian Smith and Geschwill hops that you have seen; that is, the cluster hops. [168]

A. The Wellman cluster hops are not similar to either the Geschwill or the Killian Smith hops.

Q. In what way do they differ?

A. Mr. Geschwill's hops are a seedless type of hop, are a small-burred seedless hop, while the Kil-

(Testimony of Harold W. Ray.)

lian Smith hops were a decidedly yellowish hop and the Wellman hops were a large, green, flaky hop.

The mildew damage to the Wellman cluster hops and the Geschwill cluster hops was quite similar. In fact, both contained a large number or a very large number of what we termed nubbins in the testimony.

In addition, Mr. Wellman's cluster hops contained a good many partially matured burrs that had been damaged by mildew so that they were misshapen.

Q. Is there any difference in the amount of extraneous matter apparent in these samples of the three?

A. Yes. Mr. Wellman's hops were much dirtier picked than the other two that you refer to.

Q. Did A. J. Ray & Son purchase any prime-quality hops after October 28, 1947, on the spot market? A. Yes, they did.

Q. Are those 1947 Oregon cluster hops?

A. Yes.

Q. At what price?

A. At 84 to 86 cents a pound, depending upon the leaf-and-stem [169] content.

Q. Were those the prevailing market prices?

A. That was on a basis of 85 cents, which was the prevailing market price, during the month of November at least.

Q. For whom were those purchases made?

A. For John I. Haas, Inc.

Q. Were those spot purchases? A. Yes.

Q. After October 28, 1947, did A. J. Ray & Son

(Testimony of Harold W. Ray.)

purchase any 1947 Oregon cluster hops of a quality, grade or condition similar to those of the Wellman late cluster hops?

A. No, they did not, not subsequent to that date nor prior to that date.

Q. In your judgment, what was the effect of the continuing high prices for hops through September and October?

A. In my judgment, and I think it is perfectly obvious, it would result in a very sharp increase in prices.

Q. I think you misunderstood the question.

A. Possibly.

Q. Did those high prices prevailing in September and October have any effect upon harvested quantity?

A. Oh, yes. Of course, the higher the prices—higher prices influence growers to harvest all or practically all of their hops, instead of leaving any unharvested on the vines.

Q. Do you know of any instance where growers did leave hops [170] unharvested?

A. Yes, they did, that is true; but sometime earlier in the season, before the height of this mildew scare, it was estimated by a great many in the trade that the Oregon State crop would be very short, down as low as 50,000 bales possibly, and that caused a very sharp increase in price.

Then, as prices increased many growers who had practically determined or made up their minds that

(Testimony of Harold W. Ray.)

they would not harvest any hops decided to harvest hops.

The Court: Is there anything in this case as to the range of prices between the years of OPA and 1947? Is there anything in this case on that?

Mr. Kerr: The OPA regulations, sir?

The Court: No. OPA went off when?

Mr. Kerr: I am not sure, your Honor, but I think it was 1945.

The Court: What hops were worth in 1945 and 1946, is that in the case?

Mr. Kester: I don't think so.

The Court: Put it in.

Q. (By Mr. Kerr): Are you informed as to the market price for prime-quality hops, Oregon production, in 1945? What was the market at that time?

A. May I refer to some records?

The Court: You can get them later. [171]

A. I can't answer it, your Honor, immediately. I can't remember for certain just when OPA terminated.

The Court: Well, terminated in the election of 1946.

A. On hops?

The Court: OPA died then.

A. Yes, I know, but I think the ceiling price on hops terminated prior to that, if I am not mistaken. Maybe not.

Q. (By Mr. Kerr): I believe you testified that you are paid a commission by John I. Haas, Inc.,

(Testimony of Harold W. Ray.)

on hops that you purchase for that company, is that right?

A. Yes, either spot purchases or contract. The commission is the same in both cases.

Q. Your commission is not payable, I believe you stated, when hops are not accepted by the buyer?

A. Unfortunately, it is not.

Q. You have testified concerning the services which your men,—that is, the employees of A. J. Ray & Son,—performed for John I. Haas, Inc., relative to hops under contract to John I. Haas, Inc., and others, concerning advances which were made.

A. Yes.

Q. Advances made to Mr. Wellman for picking costs and otherwise, are those advances provided from your own funds directly?

A. From A. J. Ray & Son funds?

Q. From A. J. Ray & Son funds.

A. Yes. [172]

Q. Then I believe you testified your men sampled and inspected and weighed the Wellman cluster hops. Do you receive any compensation or reimbursement at all from John I. Haas, Inc., for these services performed by A. J. Ray & Son with respect to the Wellman cluster hops which were rejected?

A. No, according to the general practice of the trade we do not.

Q. Do you receive any compensation at all from John I. Haas, Inc., with respect to hops which are rejected by that company?

(Testimony of Harold W. Ray.)

A. No, we do not.

The Court: When you advance money, you draw right away on your principal?

A. Yes, we advance the money for what we call servicing the contract——

The Court: I am not interested in that. When you advance money, you draw right away on the customer? A. Very quickly at least.

Q. (By Mr. Kerr): You do not charge any interest on the advances, do you? A. No.

Q. Did you at any time have any authority from John I. Haas, Inc., to waive any provisions of the written cluster contract with Mr. Wellman?

A. No.

Q. Did you have any authority from John I. Haas, Inc., to agree [173] with Mr. Wellman that his selection of the price, the market price under the cluster hop contract would not be in writing?

A. No.

Q. Did you at any time have any authority from John I. Haas, Inc., to accept any of the Wellman late clusters on the 1947 crops of hops?

A. No.

Q. Did you at any time have any authority from John I. Haas, Inc.; that is, did A. J. Ray & Son have any such authority, to change any provisions of the cluster contract with Mr. Wellman?

A. No.

Q. Did you personally have any such authority?

A. No. We had authority to confirm the selected

(Testimony of Harold W. Ray.)

price, if you call that an amendment or a change. That was not in the contract when it was written.

Q. Do you have the figures with you relative to the quantity of 1947 Oregon hops rejected by A. J. Ray & Son for 1947? A. Yes, I have.

Q. Will you give those to the Court, please?

Mr. Kester: May it please the Court, Counsel has previously refused to permit us to examine any records or to ask any questions with respect to what the transactions were between either Ray or any of the other companies,—Paulus, for instance,—and the growers, other growers. As I understand it, a lot of that has come out in the case, although we were not allowed to go [174] into the records or to ask questions concerning those matters. If the case is going over, I wonder if we might not, in the interim, have access to that information?

Mr. Kerr: I will withdraw the question if it raises any question with respect to contract relations between this company and other growers. I will withdraw the question.

Q. Do you know of any Oregon grower whose entire hop crop was left unharvested in 1947?

A. I do not personally know of any that was left entirely unharvested.

Mr. Kerr: That is all.

Cross-Examination

By Mr. Dougherty:

Q. Mr. Ray, you are the President of A. J. Ray & Son? A. Yes.

(Testimony of Harold W. Ray.)

Q. Does that corporation do all the buying of hops in Oregon for John I. Haas, Inc.?

A. It is my understanding that we do, yes.

Q. Do you personally represent John I. Haas, Inc., in any other respect?

A. I do, yes; not with respect to buying or contracting on hops, but John I. Haas, Inc., owns three farms in the State of Oregon, and they are registered as a corporation to do business in the State of Oregon, and I believe the statutes require that [175] they have a local representative, and I was appointed their attorney-in-fact in Oregon with respect to their operation of these farms, but I do not act in an individual capacity in buying or selling hops.

Q. Do you run these farms for them?

A. Supervise them, yes.

Q. You spoke about correspondence between your Hillsboro office and your Salem office in connection with the farm business, I suppose it was?

A. Yes.

Q. Is that what you referred to in that connection?

A. Yes, that is what I refer to.

Q. How long has your corporation represented John I. Haas, Inc., in buying hops in Oregon?

A. I can't tell you exactly without looking at the records, but approximately since 1917 or 1918.

Q. John I. Haas, Inc., has that been your sole account in the past few years?

A. In the past few years it has; prior to that time it was not.

(Testimony of Harold W. Ray.)

Q. Do you negotiate hop contracts for John I. Haas, Inc.? A. Yes, we do.

Q. Do you make spot purchases of hops for John I. Haas, Inc.? A. Yes.

Q. And did in 1947? A. Yes. [176]

Q. Are you in charge of shipping the hops which John I. Haas, Inc., buys in Oregon?

A. When you say "you" in all of these questions you mean A. J. Ray & Son?

Q. Yes. A. Yes.

Q. As I understand it, is it correct that you make advances under those contracts for John I. Haas, Inc.? A. We do, yes.

Q. And then you immediately draw on John I. Haas, Inc., for such advances? A. Correct.

Q. Do you examine yards which are under contract with the Haas corporation?

A. Generally not personally. A. J. Ray & Son does.

Q. Mr. Noakes or Mr. Davis, is that right?

A. Yes, or Mr. Troxel.

Q. Mr. Noakes, Mr. Davis or Mr. Troxel?

A. Yes.

Q. Do you obtain and record chattel mortgages or hop contracts for Haas?

A. Will you repeat that?

Q. Do you obtain and record chattel mortgages on hop crops which are under contract with Haas?

A. Yes. [177]

Q. Do you inspect and sample hops for John I. Haas, Inc.? A. Yes.

(Testimony of Harold W. Ray.)

Q. Under the open-end contracts do you have authority to confirm the selected price?

A. That authority is subject to the approval of John I. Haas, Inc., but if we inform them that the price selected is, in our opinion, the Oregon growers' market price for prime-quality hops, they usually give us authority then to do so.

Q. Was John I. Haas President of the Haas corporation in Oregon in 1947?

A. Yes, he was.

Q. Was that in August, 1947?

A. Yes.

Q. Did he at that time know that there was mildew in the Willamette Valley?

A. Yes, he did, as I recall it, but when he was here early in August he did not fully—we did not realize the extent of the seriousness of the attack, but I am not positive—he was here, as I recall it, early in the month of August.

Q. Did he instruct you at that time not to pick any mildewed yards?

A. No, I didn't hear any.

Q. Did he instruct you at that time not to make any picking advances on yards which had been hit with downy mildew?

A. No, he did not. We discussed the matter whether or not to [178] decline to make any advances and it was Mr. Haas' opinion that it would be very dangerous, a very dangerous matter, for the buyer to refuse to make advances because, prior to harvesting, it was impossible to tell for certain what kind of a hop might be produced, and if it should

(Testimony of Harold W. Ray.)

turn out that the hops harvested were of prime quality and we had refused to make advances he would have been defaulting under the contract and he felt he would be subject to damages, so it was decided if a grower requested advances it was better to make them. He did authorize, however, that there could be some adjustment of the advances, depending upon what our field men estimated the yield would probably be.

Q. Do I understand that in making these advances the field men take the checks out to the yards? Is that the normal practice?

A. I think that is the usual practice. I am not positive, Mr. Dougherty, because they may have various methods. Many growers may call at the office in Salem, but I think they usually take them out, or at least frequently do.

Q. When Mr. Haas was here in Oregon in August, 1947, did he at that time instruct you not to sample, inspect, number and weigh in hops unless you had an agreement with the grower that that would not constitute an acceptance?

A. Not when Mr. Haas was here; no, sir.

Q. Did you inspect the Wellman 1947 fuggles and clusters in his yard? [179]

A. I did not.

Q. In the warehouse? A. No.

Q. Did you inspect the type and tenth-bale samples of his 1947 fuggles and clusters?

A. I did, yes.

(Testimony of Harold W. Ray.)

Q. In connection with that inspection, would you say that they contained some mildew?

A. Yes. I know they contained a considerable amount of mildew.

Q. Would you describe the 1947 clusters as large, flaky hops of a greenish color? A. Yes.

Q. Would you say that they were well filled with lupulin?

A. That was my opinion, and I so wrote John I. Haas, Inc.

Q. Would you say that they had quite a good flavor?

A. That also was my opinion and I advised Mr. Haas accordingly.

Q. Mr. Ray, what would you say was the market price in September, 1947, for good, average quality 1947 fuggles?

A. I think that the market price in September for prime-quality Oregon fuggles and also what you call good quality—and when I say “good quality” or “average quality” I do not mean average for the state, but I mean a good, average, prime-quality hop. The market was 90 cents a pound.

There was a considerable difference of opinion as to whether or not the 90 cents for fuggles included the sliding-scale [180] provision for picking. I think in our dealings we considered that the market was 90 cents flat for prime-quality fuggle hops. I don't think that we allowed a premium or discount on the

(Testimony of Harold W. Ray.)

fuggle contracts. That is my recollection, which is not important.

Q. Do I understand when you say “a prime-quality hop” you mean a good hop?

A. Naturally, a prime-quality hop—If you will read the description in the contracts, you will have to agree that a prime-quality hop must be a good hop.

Q. Do I understand it that when you say “prime-quality hop” you mean an average hop?

A. No, I don’t mean that, Mr. Dougherty.

Q. What was the market price in September for a good, average-quality 1947 cluster hop?

A. The market price for prime-quality clusters early in September, and I think——

The Court: Answer the question the way he asks it. If you can’t answer it, say so. He asked you for the market price for a good, average quality. If you don’t know what that means, say so, and don’t answer as to something else than what he asks.

A. Will you ask me the question again?

(Question read.)

A. Well, I do not admit that a good, average quality is prime quality. Prime quality is good quality, but I do not mean to [181] say that it is average for the state.

The Court: Go ahead, Mr. Dougherty, and ask another question.

Q. (By Mr. Dougherty): Did the market price

(Testimony of Harold W. Ray.)

change during September or October with respect to clusters? A. In my opinion it did not.

Q. And the prevailing market price in October was still 85 cents? A. 85-cent base.

Q. For clusters? A. Yes.

Q. Was that the market price on or about October 31st? A. In my opinion it was.

Q. Was that the market price on or about November 15th? A. In my opinion it was.

Q. When did that price change?

A. That I can't state for certain, Mr. Dougherty, but sometime later, or considerably later than that, I think, but we did not buy any spot hops after about the 15th or 16th of November, because we were unable to find or buy good quality, and it is my recollection that the market, although very inactive, continued practically unchanged for some length of time after the 15th of November.

Q. The market after the 15th of November was quite inactive, is that correct?

A. It was, in Oregon. [182]

Q. Was it all right with John I. Haas, Inc., after that, for Mr. Wellman to sell his 1947 clusters in May, 1948, to Williams & Hart?

A. It was, and it was all right for Mr. Wellman to sell them at any time after we rejected the clusters. We so told him.

Q. When Mr. Shields called you the first part of May, 1948, and when Mr. Wellman and Mr. Kever talked to you, did you so advise them at that time?

(Testimony of Harold W. Ray.)

I mean to ask: Did you at that time tell them that it was acceptable to the Haas corporation if Mr. Wellman sold the clusters to Williams & Hart?

A. Yes.

Q. Was 31 cents a pound for Mr. Wellman's 1937 clusters a fair price in the first part of May, 1948?

A. I think it was a fair price for the quality of Mr. Wellman's hops. I think it was a fair going price for that quality.

Q. Mr. Ray, have you ever picked your own hopyards by this so-called method of selective picking?

A. If you consider the hopyard in which I am a part owner, my answer is Yes.

Q. I am speaking of your hopyards in Oregon, Mr. Ray.

A. Yes. Yes, I have. I think that is contrary to what is stated in the deposition, however.

Q. With reference to the deposition, just to refresh your memory, reading from Page 30: [183]

“Q. Have you ever had your own yard picked that way in Oregon?

“A. No, sir; no, sir. I have attempted to do it to a certain extent.

“Q. Why weren't you successful?

“A. Well, it was just difficult to get pickers to do it, and it would be rather expensive.”

A. Yes.

Q. Is that your testimony at this time?

A. Yes. I am not disputing that, Mr. Dougherty. You put the question whether I had ever done it

(Testimony of Harold W. Ray.)

selectively, and I recall that I, a number of years ago, picked selectively when we had a very severe attack of what we call mold in the hops, and left portions of the yard intact and also portions of the vine intact, which certainly would be selective picking. I overlooked that when I made that answer in the deposition.

Q. That was some years ago, Mr. Ray?

A. Yes, that was a number of years ago.

Q. What would selective picking mean, as you understand it?

A. It would mean picking cone by cone.

Q. Would you say that such selective picking was feasible or practicable in Oregon in 1947?

A. No, I don't think it was practical. I do think it was practical and feasible to leave certain burrs on the vine where the infection might be worse, leave them unpicked, but I think [184] what you mean, when we speak of selectively picking, it means picking the hops, you might say, one by one selectively off the vines. I don't consider that was practical.

Q. With reference to Exhibit 3-Q, that is a carbon copy of your letter of October 7th?

A. Yes.

Q. Did you by that letter notify the Haas corporation that Mr. Wellman had agreed to a market price of 90 cents on his fuggles and 85 on his clusters?

A. Yes.

Q. Did you by that letter advise the Haas cor-

(Testimony of Harold W. Ray.)

poration that a number of growers had notified you of their growers' market price selections by telephone rather than by written communication?

A. Yes. I added a postscript to the letter which states: "A number of these market contract growers notified us by telephone prior to the date shown above."

Q. Did John I. Haas, Inc., take Mr. Wellman's 1947 fuggles at 90 cents a pound, at the 90-cent figure of which the Haas corporation was notified by your letter? A. The fuggles, yes.

Q. In prior years, under this same type of contract, had Mr. Wellman ever advised you in writing of his selection of the growers' market price?

A. Not that I recall, no. I think he did not. [185]

Q. Was it your impression that was always done orally? Is it still your impression that was always done orally?

A. Well, it was generally oral, principally, by A. J. Ray & Son.

Q. Did the Haas corporation, in response to this letter of October 7th, at any time object to such telephonic notifications?

A. I believe they did, yes. I believe that they instructed us that they wanted the notifications from the growers in writing, as was provided for in the contract, and we did induce quite a number of our growers to do that. We had to keep right after them to get them to do it.

My position was that I was anxious to get the

(Testimony of Harold W. Ray.)

growers to select these dates because I was fearful of a decline in price. It did not occur, but I was fearful of it, and I wanted them to get protected under these high prices and I wanted them to give us what you might call a formal notification of their selection.

Q. With reference to the letter of October 7th, Exhibit 3-Q, did the Haas corporation ever refuse to recognize any of the selected prices on the ground that the buyer was notified by telephone?

A. No.

Q. With reference to Exhibit 3-I, which is your telegram to John I. Haas, Inc., of September 24th—

A. —September 24th? [186]

Q. Yes, 1947. A. Yes.

Q. I believe that telegram says that you will attempt to do something. A. Yes.

Q. What does that word “attempt” mean? What do you mean by that?

A. It means just exactly what it says, Mr. Dougherty. They had instructed us to proceed upon that basis and I wired them confirmation that we would attempt to proceed on that basis. It is conceivable some grower might refuse to let us proceed on that basis, in which case all we could do would be to attempt to.

Q. With reference to Exhibit 5, which is a telegram from John I. Haas, Inc., does that telegram refer to the telegram that we have just talked about, Exhibit 3-I?

(Testimony of Harold W. Ray.)

A. Well, 3-I was a telegram from ourselves to John I. Haas, Inc., dated September 24th.

Your Exhibit No. 5 is a telegram from John I. Haas, Inc., to A. J. Ray & Son, dated September 25th, in which he states or suggests, rather, that we do that.

I don't know why he told us again. He had instructed us to do it and then he suggests that all contracts, including the 44- to 50-cent group be notified by letter that inspection, sampling and weighing does not constitute acceptance, and that the decision of this question by the home office will be communicated to the grower later so that no misunderstanding of such inspection can arise.

Those are their instructions to us, that we must have that in writing.

Q. As a matter of fact, was not the procedure outlined in your telegram of September 24th a suggestion to John I. Haas, Inc., and wasn't this telegram of September 25th from John I. Haas, Inc., their instructions to follow that procedure?

A. Yes, it was, Mr. Dougherty, but we had not specified in our telegram of September 24th that we have this understanding or agreement with the growers in writing, and then they answered us the following day and instructed us that we must have it in writing, and then we proceeded on the 25th of September—I drafted a letter, which was typed and sent to all contract growers, and I told them not to send it to Mr. Wellman because they were inspect-

(Testimony of Harold W. Ray.)

ing and weighing and sampling Mr. Wellman's hops that very day.

Q. Do I understand, then, that on September 25th, by this letter—this telegram marked Exhibit No. 5, that John I. Haas, Inc., concurred with your suggestion that the hops be weighed in under this arrangement?

A. No, Mr. Dougherty, I don't agree with you. My wire to them on the 24th referred to their telegram of the 24th which I assume instructed us to—that that was the way to proceed, to [188] have that understanding.

Q. Do you have Exhibit 3-G before you?

A. Yes. Wait a minute. Let's see now. I don't think I have.

(Exhibit 3-G handed to the witness.)

Q. Is Exhibit 3-G the Haas telegram you are referring to?

A. That apparently must be the reference—this telegram of September 24th from John I. Haas, Inc., must have been the telegram that I was wiring an answer to on the 24th.

It does not state anything about the manner of proceeding with this weighing and inspecting of hops. It apparently would seem that I, on September 24th, had suggested to them that this would be a method of getting the ball rolling, but I did not include in this telegram anything about having that agreement in writing.

They came back, then, on the 25th and suggested

(Testimony of Harold W. Ray.)

that they be notified by letter, that it be put in writing.

Q. I would like to get the sequence straight.

A. It is a little difficult for me, too.

Q. Do I understand that by Exhibit 3-G, the telegram of September 24th, John I. Haas, Inc., sent a telegram relating to their general policy, is that correct?

A. That must be so, yes. I have got that marked "Re: Policy Handling Contracts."

Q. Then, by Exhibit 3-I, the text of which is also shown in Exhibit 3-H of that same date, or September 24th, is it correct [189] to say that you suggested to the Haas corporation a particular procedure for handling this matter?

A. Yes, I think that is correct.

Q. Then, on the following day, or on September 25th, by the telegram marked Exhibit No. 5, is it correct to say that the Haas corporation approved the procedure suggested by you, with the additional feature that it should be done in writing?

A. Correct.

Q. Do I understand Mr. Wellman's clusters and fuggles were weighed in on the 25th?

A. Yes, that is the date.

Q. Did you start writing these letters to other growers on the 25th? A. Correct.

Q. You have previously testified you gave instructions to Mr. Noakes on this matter several days before the 25th, is that correct?

(Testimony of Harold W. Ray.)

A. It is. That is correct, yes.

Q. How could you have given those instructions to Mr. Noakes several days before the 25th when the policy was decided upon—when the policy was not decided upon, rather, until the 25th?

A. Because I wanted to proceed with caution, and I told Mr. Noakes that he must not, under any circumstances, inspect or weigh any contract hops without an understanding that it did not constitute an acceptance, because we had received no authority to accept any of those hops at that time; that authority had been taken completely out of our hands; and that the Washington office had to decide upon the quality.

Q. When was it that that authority, as you say, was taken completely out of your hands?

A. I can't state the exact date.

Q. Was that before——

A. Mr. Frederick J. Haas, the son of Mr. John I. Haas, and an officer of the company, was here in Oregon at that time, and he was at my office numerous days and he inspected many of these samples, and he told me that we must proceed with caution on these things and that we must not accept any of these hops until Washington had approved of it.

Q. What time was Mr. Frederick Haas here?

A. He was here on the Pacific Coast, between California, Washington and Oregon, from practically the beginning of the harvest until consider-

(Testimony of Harold W. Ray.)

ably after the harvest, in connection with their farming operations on the Coast.

Q. As a matter of fact, wasn't this authority taken out of your hands by that letter of September 24th? I beg your pardon. Wasn't that authority taken out of your hands by the telegram of September 24th which is marked Exhibit 3-G?

A. I didn't consider it so, Mr. Dougherty, and I still don't.

Q. You did not consider Exhibit 3-G as taking any authority out of your hands, is that correct?

A. No. I can't so construe it.

Q. In prior years had you not inspected samples and weighed in hops under contracts with Haas on your own judgment?

A. No. That is not true, Mr. Dougherty. No.

Q. Had you ever before had such an arrangement with Mr. Wellman under this same series of contracts with Haas corporation?

A. No, I think not. If I might state, however, the general practice had been that the buyer would reach his decision upon the basis of type samples submitted to him and then would give us our instructions whether or not to accept. If they told us to accept, it would be on the basis that the hops would actually run equal to the type samples.

Q. In prior years do I understand that you had, at the time of inspection at the warehouse, determined whether or not the crop as a whole would be accepted?

(Testimony of Harold W. Ray.)

A. That was the usual case, yes.

Q. Do I understand that in 1947 the Haas corporation dealt only in prime-quality contracts, so-called prime-quality contracts?

A. They were the only kind of contracts they had.

Q. Do I understand that it is your opinion, Mr. Ray, that a hop to be cleanly picked, under the so-called prime-quality contracts, must have not more than 6 per cent extraneous matter?

A. That is my personal opinion, yes.

Q. Did the Haas corporation take any hops under prime-quality contracts in 1947 which had more than 6 per cent? [192]

A. They did not take them under prime-quality contracts, Mr. Dougherty, but they bought, in a number of cases—in a number of cases waived the quality specifications in the contract and accepted hops that were dirtier picked.

Q. With reference to Exhibit 3-W, the second page, the second paragraph, and with particular reference to Sample No. 42, did that sample show a 9 per cent pick? Is that your handwriting on the side?

A. Yes. Yes, that is my handwriting, and that is apparently what the hops analyzed, was 9 per cent.

Q. Were you authorized by the Haas corporation to take that 9 per cent picked crop under the contract?

(Testimony of Harold W. Ray.)

A. It says: "Newton: Sample No. 42. We have authorized you to take these 38 bales at the contract price. They are slightly tinted but otherwise the quality is fairly good."

Q. Does that mean they were slightly tinted with mildew?

A. No, that don't. They were slightly tinted with ripeness.

Q. With reference to Page 2, the eighth paragraph of that exhibit, Mr. Ray—— A. Yes.

Q. ——were you authorized by the Haas corporation in 1947 to take the 60 bales of clusters on Sample 88 on the 50-cent contract, even though they showed a 10 per cent pick?

A. That I don't know, what they showed, but they authorized us to accept those hops at 50 cents.

Q. They authorized you to accept the hops, regardless of the pick, is that correct?

A. It says, "We have authorized you to take the 60 bales on the 50-cent contract. This is another case where we do not have the picking analysis but the hops seem to be quite good and therefore we will take them."

Q. Was a 50-cent contract a high- or low-priced contract for 1947?

A. For 1947, the fall of 1947, it was a low price.

Q. Did you actually take those hops at 50 cents?

A. I presume that we did.

Q. What is that notation on the side there, "10 per cent equals 47 cents"? What does that mean?

(Testimony of Harold W. Ray.)

A. That would mean, in my opinion, that on account of the 10 per cent picking that there should be a discount of 3 cents a pound. That would have made them 47 cents. Without reference to the previous record, I cannot tell whether we took them at 50 or 47.

Q. With reference to Page 1 of that letter, the last paragraph (Exhibit 3-W), did the Haas corporation authorize you to deliver late clusters under a contract even though those clusters showed 10 per cent picking? A. Correct.

Q. Those were all prime-quality contracts, were they?

A. The hops were covered by prime-quality contracts, but the [194] Seeres crop price, market price, the determination was made quite early in the season at 65 cents. In other words, 20 cents below the price after the hops had been harvested, and the Serres hops had a very light amount of mildew damage and, therefore, they waived the bad picking for the reason that the hops were fairly free of mildew.

Q. Did the Serres 65-cent contract contain a picking clause?

A. I can't answer that question, Mr. Dougherty. I don't have the record here.

Q. To refresh your memory, I wonder if you would look at Exhibit 3-Q, which is a carbon copy of your price notification letter to Haas, dated October 7, 1947. Does that answer the question?

A. I don't think it does.

(Testimony of Harold W. Ray.)

Q. Does that indicate whether or not that Serres 65-cent contract had a picking clause in it?

A. Oh, yes. It says No.

Q. "No picking clause"?

A. No picking clause; just cleanly picked hops.

Q. You took that 10 per cent pick under that contract, referring to Page 1 of Exhibit 3-W, at the bottom of that page?

A. Yes. Yes, I know that we took them; yes.

Q. Did you take off 2 cents because of the 2 per cent over 8 per cent pick?

A. That is a question I can't answer. I can't remember.

Q. Were you authorized by the Haas corporation to take them [195] at 63 cents, because of the 10 per cent pick?

A. Yes.

Q. With reference to Exhibit 3-W, will you look at the top of Page 3?

A. Yes.

Q. Did you take, under a prime-quality contract, hops which showed 12 per cent pick, and which were tinted by mildew?

A. Who are you referring to there?

Q. Pahl, Sample 59.

A. No, we didn't, Mr. Dougherty. Those hops were rejected. This letter apparently was an authorization to take them but, before those hops were accepted, they changed their instructions and those hops were not accepted. They were rejected outright on the contract.

Q. But they at first authorized you to take them?

(Testimony of Harold W. Ray.)

A. They said in this letter, "Sample No. 59: These 47 bales appear to be fairly good from the one sample which we have here, although they are somewhat tinted and are of only medium quality. We have authorized you to take over this lot in order to protect our advances."

Well, we didn't take them over. We rejected them, and we have not recovered our advances.

Q. Those hops show the 12 per cent pick, is that correct?

A. Yes, that is the notation that I have written on the margin of that letter. [196]

Q. With reference to Page 2 of that letter, the fourth paragraph, relating to Foster, Sample 66, was that so-called prime-quality contract?

A. Yes, all contracts, Mr. Dougherty, were prime-quality contracts. They all specified prime-quality hops.

Q. In this particular instance, on a prime-quality contract, the Haas corporation authorized you to take over hops which showed 13 per cent pick?

A. Yes, they did, but there were extenuating circumstances. They did it for their self-protection.

Q. Were those hops tinted with mildew?

A. Practically none, but they were very dirty picked.

Q. Did the Haas corporation consider they were of good quality? A. No.

Q. As a matter of fact, didn't the Haas corpora-

(Testimony of Harold W. Ray.)

tion instruct you to apply the picking penalty in all cases, regardless of whether the contract contained the so-called picking clause or not?

A. I don't think they ever gave me those instructions, exactly, Mr. Dougherty.

Q. With reference to Page 2, Paragraph 7, of the letter, Exhibit 3-W, does that refresh your memory?

A. Yes. "We do not have a picking analysis on this lot," and "We are leaving it to you to apply penalties on the picking in this and other cases where it can be done." [197]

Q. What does the clause "where it can be done" mean?

A. Some of these growers with low-priced contracts, 40- or 50-cent contracts, but with a high cost of production, if their hops were not too terribly bad, in self-protection we had to practically take them to get our advances back; didn't have the nerve to ask them for a discount because of the dirty picking.

Q. On the higher-priced contracts was it your procedure to apply the so-called picking penalty?

A. Yes, that was the general practice of the higher contracts.

Q. Do I understand that in your opinion hops that would be in that class cannot be prime-quality hops? Is that correct?

A. Under a strict interpretation they could not be.

(Testimony of Harold W. Ray.)

The Court: Recess until 1:30.

(Thereupon a recess was taken until 1:30 o'clock P.M., of the same day.) [198]

1:30 o'clock P.M., February 1, 1949

Cross-Examination
(Continued)

By Mr. Dougherty:

Q. Mr. Ray, this morning you referred to a case you knew of concerning selective picking in a yard in which you had an interest. Is that yard located in the United States? A. No, it was not.

Q. Do I understand, Mr. Ray, that it is your opinion that a good hop is not necessarily a prime hop? Is that correct?

A. That is my opinion, yes.

Q. Do I understand that in your opinion a prime hop should be picked 6 per cent or cleaner, is that correct?

A. I stated that as my opinion, Mr. Dougherty, although I am frank to admit that in 1947, 8 per cent generally was conceded to be and was, in fact, the picking that was allowed for a prime-quality hop.

Q. In 1947 did John I. Haas, Inc., take any hops under so-called prime-quality contracts that were 13 per cent picked?

A. I believe they did, yes.

Q. Where did Mr. Wellman take his 1947 fuggles and clusters?

(Testimony of Harold W. Ray.)

A. You mean to what warehouse?

Q. Yes. [199]

A. To Schwab's warehouse in Mt. Angel.

Q. Was Schwab's warehouse in Mt. Angel an acceptable place to John I. Haas, Inc.?

A. Yes. I think the Mt. Angel warehouse was specified as the delivery place in the contract.

Q. Was the time that he delivered them there acceptable to John I. Haas, Inc.?

A. Why, yes.

Q. In your opinion, Mr. Ray, a lot of hops which contains some mildew, is that lot a prime-quality lot?

A. Strictly speaking, I would say it is not a prime-quality hop.

Q. In 1947, as a matter of practice did the John I. Haas corporation take in any clusters which showed some mildew, under prime-quality contracts?

A. You mean did they accept them on contract if they showed some mildew?

Q. Yes.

A. Yes. I think that they did, Mr. Dougherty, where the mildew infection was very slight and where the quality otherwise was good.

Q. With reference to Exhibit 3-W, which is that three-page letter——

A. That three-page letter, yes.

Q. On the first page, in the sixth paragraph——

A. Yes.

Q. ——did the Haas corporation in 1947, on Sample 64, accept a lot of hops under a so-called

(Testimony of Harold W. Ray.)

prime-quality contract which were rough, tinted and showed mildew damage?

A. May I refer to notes?

Q. Please do.

A. Yes, I think they accepted those hops, not as a prime hop, but they waived the quality specifications because of other circumstances, other than quality.

Q. Were those hops covered by a so-called prime-quality contract? A. They were, yes, but——

Q. The Haas corporation paid the contract price?

A. These hops were contracted at 45 cents a pound, which was an extremely low price as compared to the market at that time, and I assume they submitted samples of these hops to a brewery which had them purchased at a low price and they decided to waive the quality specification and accept them because the price was low.

Q. Is that an assumption on your part, Mr. Ray?

A. Well, I couldn't prove it.

The Court: I was interested in a remark you just made. Did they resell at that contract price?

A. They usually keep their sales practically in balance with their contract purchases and, therefore, hops that were purchased [201] at low prices were also sold to breweries at correspondingly low prices; that is, with a margin between.

Q. (By Mr. Dougherty): Do I understand that on the Mattison-Sloper contract, Sample No. 39,

(Testimony of Harold W. Ray.)

that they took 129 bales on the floor contract at 75 cents?

A. I will have to refer again to notes. I can't remember all of those things.

Yes, that contract was divided. In other words, there were 159 bales involved, made up of 129 bales on one contract, the first contract, and 30 bales on a second contract.

The first contract was an open-end contract and the second contract was at a fixed price of 45.

On the first contract, 129 bales were rejected and re-purchased on the basis of 75 cents for 8 per cent picked hops, and these hops were 9 per cent, and we paid 74 cents.

Q. This language in the letter of October 30th, Exhibit 3-W: "We have authorized you to take over the . . . 129 bales on the floor contract at 75 cents." What does that authorization mean?

A. Well, it means that the contract to which the 129 bales applied was what we term an open-end contract, which John I. Haas referred to as a floor contract. They were not floor contracts. They did have a minimum prime, provided for the minimum or the market, whichever was the higher, and of course they were all at market. [202]

Q. Is it correct to say, Mr. Ray, you were authorized to take over this particular lot of mildewed hops on that prime-quality contract?

A. No, sir. No, sir; that is not the case. We were authorized—what we did was that we rejected

(Testimony of Harold W. Ray.)

those hops, these 129 bales, on the contract, and repurchased them from the grower at 10 cents a pound lower. Then there was a one-cent discount for picking.

Q. Isn't it a fact that you were exercising a contractor's privilege when you did that, taking them at a lower price than specified in those contracts?

A. No, I would not consider it so. I don't think I understand just what you mean, Mr. Dougherty.

Q. Don't these contracts provide the buyer shall have the privilege of taking them at a lower price?

A. My interpretation was or is that he has the privilege of taking a portion of them at a lower price in order to recover his advances, but this transaction was not handled in that manner, as using that privilege specified in the contract.

I, in fact, told Mattison that we could not accept those hops on the contract because of the quality, and then I made the deal with him and repurchased them on the 75-cent-a-pound basis, which was reduced one cent on account of the picking.

Q. Other than the mildewed hops referred to in the letter of [203] October 30th, which is Exhibit 3-W, how many lots of mildewed hops did the Haas corporation take in, in 1947?

A. I don't think I can answer that, Mr. Dougherty, without additional notes. I didn't anticipate——

Q. Can you give us an approximation?

(Testimony of Harold W. Ray.)

A. Well, I can put it in this way: They accepted practically no hops that were seriously affected with mildew unless, in a few cases, the price was low, the contract price was low, around 45 to 50 cents a pound, or in some cases where it was necessary to try to get their advances back; if they were badly infected with mildew, they rejected them outright, even though their advances were jeopardized.

I can't state the quantity, but you can see from this letter that you have read that there were a number of lots of hops that showed some degree of mildew that they took over, where they waived their rights with respect to quality and took the hops over, but, for the most part, they did not accept hops that had any appreciable quantity of mildew. I will qualify that by saying, "on the contracts." There were a number where there was a small amount of mildew, where they rejected the hops and re-purchased them at a lower price.

Q. Mr. Ray, did you ever talk personally with Mr. Wellman in August, 1947?

A. No, I didn't talk personally with Mr. Wellman prior to, I think, the first few days in December of 1947, and I don't [204] believe I talked with him during the year of 1947, prior to that.

Q. Did you have any telephonic or written communication with him prior to December, 1947?

A. I don't recall any.

Q. When Mr. Frederick Haas was in Oregon for the harvest season of 1947, did you have any con-

(Testimony of Harold W. Ray.)

versation with him concerning Mr. Wellman's hops?

A. Yes. I don't know if I had a conversation with him, but he had some conversations with me.

Q. In order that there may be no misunderstanding, may I refer to the deposition——

A. Yes.

Q. Reading from Page 28:

“Q. Did you have any conversation with any of those officials of the Haas corporation when they were in Oregon in 1947 with reference to Mr. Wellman's 1947 drop?

“A. I don't believe we did.”

A. Yes. Well, I would qualify that answer now with respect to Mr. Frederick Haas particularly. This was with Mr. Haas—this was after the harvest and when he saw a type sample of Mr. Wellman's hops.

Q. That was one of the samples which one of your men had taken from Mr. Wellman's crop, was it? [205] A. Yes.

Q. That was before the inspection in the warehouse? A. Yes, that is correct.

Q. Did Mr. Frederick Haas ever inspect Mr. Wellman's crop in the warehouse? A. No.

Q. Did he ever inspect that crop in the yard?

A. Not to my knowledge. I don't think he did.

Q. To your knowledge, did Mr. Frederick Haas have any conversation with Mr. Wellman personally?

(Testimony of Harold W. Ray.)

A. Not to my knowledge. I am almost certain he did not.

Q. Did Mr. John I. Haas have any conversation with Mr. Wellman personally in 1947?

A. Not to my knowledge. I also am quite certain he did not.

Q. How about Mr. Walter Rauber?

A. No, Mr. Rauber was not on the Coast, to my knowledge, at that time.

Q. Did any official of the Haas corporation have any conversation with Mr. Wellman?

A. Not to my knowledge.

Q. By "conversations" I mean to include both written and telephonic, and personal.

A. Yes. Well, if they did, I didn't know that, and I am quite certain that they did not.

Q. To the best of your knowledge, were all of the dealings [206] between John I. Haas, Inc., and Mr. Wellman in 1947 conducted through your organization?

A. Yes.

Q. Was that the case also in prior years, under this same group of contracts?

A. Yes.

Q. Was the procedure, the transaction between your organization and Mr. Wellman with respect to these Haas contracts substantially the same in 1947 as it had been in prior years?

A. It was not.

Q. Do you now have reference to this alleged agreement concerning the weighing-in?

A. Yes. That is what I refer to.

(Testimony of Harold W. Ray.)

Q. Aside from that, were the transactions substantially the same?

A. I should judge so. I don't think of anything that was different except what you referred to, that we preferred inspection and tenth-bale samples and the weighing with the understanding that they would not constitute an acceptance, because we did not have authority to accept them.

Q. Do you have any personal knowledge concerning that matter, Mr. Ray?

A. I was not present, no. I have no knowledge except what was told to me.

Mr. Dougherty: Thank you, Mr. Ray. [207]

Redirect Examination

By Mr. Kerr:

Q. Counsel asked you this morning about market prices of good, average-quality hops. Do you have any means of knowing what the average quality of hops in Oregon was in 1947?

A. No, I couldn't fix the point of average quality in 1947 for cluster hops. It would be impossible for me to do it.

Q. You referred to the Wellman cluster hops as having been weighed in on September 25th. What do you mean by "weighed in"?

A. I did not mean weighed in. If I said it, I spoke ill advisedly. I meant that they were weighed.

Q. You are being handed Exhibit No. 7. Will you look at Exhibit No. 7 and state whether or not

(Testimony of Harold W. Ray.)

that is one of the telegrams that you referred to instructing you to proceed with caution?

A. Yes.

Q. Will you read the portion referring to the policy of proceeding with caution.

A. Yes. It says: "Frankly do not know what will be able to do about Oregon deliveries this season and must go slow."

Q. What is the date of that telegram?

A. September 22nd.

Q. That is a wire to you from John I. Haas, Inc.? Is that right? [208]

A. Yes.

Q. Reference was made to several of the growers' hops referred to in the letter of October 30th, which is Exhibit 3-W. Do you have that exhibit before you?

A. Yes, I do.

Q. Refer to Page 2, the seventh paragraph, relating to the Hayes contract. State whether or not the Hayes contract provided for a sliding-scale proposition; that is, premiums and discounts?

A. Yes, it did.

Q. Is that reference in the last sentence of that paragraph a reference to such a sliding-scale provision?

A. Yes. It says, "We are leaving it to you to apply penalties on the picking in this and other cases where it can be done."

Q. What was referred to by the words "where it can be done," if you know?

A. My opinion is that with respect to contracts

(Testimony of Harold W. Ray.)

that were considerably below the then going market price that they anticipated it would be rather difficult to arrange for discounts for picking with some of these growers, and they would protest very strongly, and, inasmuch as they had their hops sold so far below the market, we did not like to be too drastic in dealing with them.

Q. Under these sliding-scale price contracts did you also pay a premium as well as take a discount?

A. Yes. For picking that was less than 8 per cent, there was a [209] premium. In this particular case that you speak of, Hayes, there was a discount of one cent per pound for picking, or 9 per cent.

Q. Were other contracts referred to in the letter concerning which you were examined by Mr. Dougherty also contracts with sliding-scale price provisions?

A. All contracts had sliding-scale price provisions, in one manner or another. Some contracts were written before the sliding-scale price provisions were in vogue, before they were used, but the majority of these contracts were what we call open end or market-price contracts, and where it was established that the market was 85 cents, or a certain price, on the sliding scale, why, then, that sliding scale became applicable to the contract, even though it was not mentioned in the contract.

Q. You have referred to instances where John I. Haas, Inc., in 1947, did buy or accept hops that

(Testimony of Harold W. Ray.)

contained 10 per cent or greater leaf-and-stem content.

What were the circumstances, as a general rule, concerning the acceptance of such hops in 1947 by your firm?

A. A majority of those cases were hops at a contract price very materially below the then going market price, and there were other cases where dirty picked hops were accepted if the hops did not show any appreciable amount of mildew.

Naturally, hops without mildew were scarce in 1947 and the trade was anxious to get them and, in a very considerable [210] number of cases they waived the contract specifications with respect to picking, if they did not show any appreciable amount of mildew.

Q. Are you prepared to state what the prevailing market price for prime-quality hops in Oregon was in 1945?

A. In 1945, if you will permit me to refer to notes——

Q. Yes.

A. I am quite positive that in 1945 the OPA ceiling price was in effect. Yes, it was. The OPA ceiling price was 64 cents a pound for seeded cluster hops at a basis of 8 per cent picking. That was the ceiling price, and we applied that in practice—that was for a prime-quality hop—because there was no restriction with respect to paying a lower price than ceiling.

(Testimony of Harold W. Ray.)

Q. What was the prevailing market price for prime-quality cluster hops in Oregon in 1946?

A. In 1946, according to my records, I believe the OPA ceiling price—I think it had been vacated in 1946, but in the early part of 1946 the market for prime-quality hops was 64 cents a pound, which was the same as the ceiling price had been.

Q. Do you have the market price for 1944?

A. That was the ceiling price, 64 cents, for prime quality 8 per cent picking. OPA didn't say anything about price quality. That was 64 cents a pound for a seeded hop, that is all there was to it, of an 8 per cent pick.

Q. Did OPA establish differentials, premiums and discounts [211] above or below 8 per cent?

A. Yes, they did, and my recollection is that the scale was three-quarters of a cent a pound for each one per cent of picking, either above or below 8 per cent, premium or penalty.

Q. You refer to "taking over hops in 1947 to protect our advances." What do you mean by that term "protect our advances"?

A. Well, John I. Haas, Inc., through ourselves, had made advances on all of these contracts and, in quite a number of the contracts, the circumstances were such that for one reason or another they were doubtful of our ability to recover those advances unless we took over the hops.

Mr. Kerr: That is all; thank you.

The Court: Mr. Kerr, I would like for you to

(Testimony of Harold W. Ray.)

inquire whether an adjustment was made between his principal and himself as to all this money he had laid out on what you call servicing these contracts, such as the incurring of telegraphic expense, telephone expense and other overhead items. Was that a complete loss to him under the circumstances?

A. It was, yes.

Q. (By Mr. Kerr): The record shows that A. J. Ray & Son, during the course of the season, expended sums for telegrams, inspection of hops and hop seals, contacting growers, sampling lots of hops, and performing other services in connection with the contracts between those growers and John I. Haas, Inc.

When the hops covered by such a contract were rejected by John I. Haas, Inc., and not-repurchased, were you reimbursed [212] in any way by John I. Haas, Inc., for those expenses?

A. We were not, no. We received no commission and we were not reimbursed for our costs in servicing those contracts, and the cost to us in connection with rejected hops, as for example this case, is many times greater than it would be otherwise, but we receive no recompense for that at all.

Q. Where hops are not taken in by John I. Haas, Inc., are all of those expenses incurred by your firm a complete loss to you?

A. They are, yes. Therefore, we are not anxious to reject hops, I can assure you of that.

Mr. Kerr: That is all.

(Testimony of Harold W. Ray.)

Recross-Examination

By Mr. Dougherty:

Q. You said you had no way of knowing what the market price for 1947 for average-quality hops was. Is that correct?

A. I don't think it is entirely correct, Mr. Dougherty. I believe that he asked me if I could say what the average would be on an average-quality hop for the season. I stated I could not, I would not know how to figure out what the average quality for the year was. I don't believe I said "price." Possibly I am wrong.

Q. Do you know what the going market price on good, average-quality hops was in 1947, say, in September of that year? [213]

A. Yes, I know that, Mr. Dougherty. During September buyers were anxious to buy hops selling at 85 cents a pound, 85 cents a pound for prime-quality clusters, Oregon hops, and it was my opinion that 85 cents a pound was paid for cluster hops that were not fully prime in quality, and I would call those good hops.

Q. I believe you stated that all open-end contracts, in one way or another, incorporated the sliding-scale feature. Is that correct?

A. That is my opinion, Mr. Dougherty, because if they were open end, they provided for the fixing of the price, depending upon the Oregon growers' market for prime-quality hops as of a certain date, selected by the grower. Now, if on the date se-

(Testimony of Harold W. Ray.)

lected by the grower, if the market on that date was, say, 85 cents for an 8 per cent hop, that was the market we would have to apply to that contract; that is, we would have to then apply the sliding-scale feature because that was the market price. That is what I refer to.

Q. In arriving at the amount of your commission from John I. Haas, Inc., was any consideration given to the matter of your general overhead?

A. No, there was not. I am not certain that I understand just what you wish to know.

Q. Under your bookkeeping system do you charge each telephone conversation, each telegram and so forth against any particular [214] contract?

A. Oh, no, we do not. We charge it probably to expense or those things and we do not recover—we do not pass that on to Haas afterwards.

Our services to Haas are paid for simply on a commission basis, so much for each pound of hops that we handle and deliver to them. If the hops are not delivered to them, if they are rejected and not received, we do not get anything back. We are out of pocket.

Q. In arriving at your arrangement with the Haas corporation, do you consider the amount of commissions which you do receive recompenses you for your general overhead?

A. Ordinarily I would say they do, yes, but in 1947 our business produced a very small margin of profit.

(Testimony of Harold W. Ray.)

Q. Under this arrangement with the Haas corporation are you expected to incur expenses for these items of overhead expense?

A. Why, certainly. That is a part of the service that we perform, but, naturally, where we perform this we are expecting to get paid in the way of a commission.

Q. Is it part of your arrangement with John I. Haas, Inc., that you shall, for example, maintain the Salem office?

A. Oh, he doesn't specify—he has never specified that we must maintain the Salem office.

Q. But he does expect you to have field men?

A. He expects us to give service in the handling of the business [215] and, if we feel it is necessary to maintain a field office in Salem to do that, we do it. That is what we have done.

Mr. Dougherty: Thank you.

(Witness excused.)

EMMA L. TOWNSEND

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. State your name, Mrs. Townsend.

A. Emma L. Townsend.

Q. Where do you live, Mrs. Townsend?

(Testimony of Emma L. Townsend.)

A. Hillsboro, Oregon.

Q. What is your occupation?

A. Secretary and Office Manager, A. J. Ray & Son, Inc.

Q. How long have you been employed in that position?

A. Twenty-nine years next month.

Q. During that period you have continuously been engaged with A. J. Ray & Son, is that right?

A. Yes.

Q. Are you located in the office of A. J. Ray & Son in Hillsboro? A. Yes. [216]

Q. Have you ever met Mr. Wellman, the plaintiff in this case? A. Yes.

Q. Where did you first meet him, if you recall?

A. I first met him in the Salem office, around Thanksgiving, or the day before Thanksgiving, 1947.

Q. Did you thereafter see him in the Hillsboro office of A. J. Ray & Son? A. Yes.

Q. Do you recall about when that was?

A. It was the next week, so it must have been around the 1st of December or thereabouts.

Q. Was anyone with Mr. Wellman when he came to the office at that time?

A. No, he was alone.

Q. Did you hear the conversation between Mr. Wellman and Mr. Ray? A. Yes.

Q. Do you recall what that conversation was?

A. Yes, I believe I do, substantially.

(Testimony of Emma L. Townsend.)

Q. Where did the two men talk, Mr. Ray and Mr. Wellman? Where were they?

A. In Mr. Ray's office. The door is open between Mr. Ray's office and the main office.

Q. Could you hear the conversation that took place in Mr. Ray's office? [217] A. Yes.

Q. Do you recall whether or not at that time Mr. Wellman made any request of Mr. Ray for payment of any money? A. No, he did not.

Q. You definitely recall that, do you?

A. Yes, sir; I do.

Q. Do you recall Mr. Ray making any mention of a moral obligation at that time? A. Yes.

Q. What was his statement in that regard?

A. He said that, "We feel we have a moral obligation but not a legal obligation," and by referring to "We" that would be John I. Haas, Inc., and ourselves, as representatives.

Q. Did you hear any comment at that time of a compromise settlement?

A. I am quite certain that Mr. Wellman asked if Mr. Ray thought the Haas corporation would make a compromise settlement on his late cluster hops that had been rejected.

Q. Do you recall what Mr. Ray said in reply?

A. Mr. Ray said, "Well, I don't know," he doubted that they would.

Q. Do you recall other parts of the conversation between Mr. Ray and Mr. Wellman at that time?

A. They visited more or less, generally, talking

(Testimony of Emma L. Townsend.)

about the bad mildew condition prevailing and the difficulties of picking. [218] He said all his dealings with Mr. Noakes in the Salem office had been fair and square.

Q. Who said that, Mrs. Townsend?

A. Mr. Wellman; or words to that effect.

Q. Was anything said about disposing of Mr. Wellman's cluster hops?

A. Yes. That was the principal reason Mr. Wellman stopped by. He was on his way on a fishing trip on the Wilson River, and he stopped by to inquire if the Haas organization had been able to find an outlet for the rejected cluster hops. Mr. Ray stated, "Yes, we have been working, but have not been able to find an outlet."

Q. Did Mr. Ray say anything to Mr. Wellman about Mr. Wellman making an effort to find a place for the hops? A. Yes.

Q. What did he say in that particular?

A. "You do everything you can to find a place for them yourself."

Q. Who said that, Mrs. Townsend?

A. Mr. Ray said that.

Q. Did he make any further statements on that subject?

A. He said, "We have been and we will continue to do our utmost to find an outlet for those hops."

Q. Do you recall anything further as to the conversation on that date? [219]

A. I don't believe I recall very much more.

(Testimony of Emma L. Townsend.)

Q. Was that the first time you had seen Mr. Wellman in the Hillsboro office?

A. Yes, it was.

Q. Can you state how you happen to remember that particular occasion?

A. Because I had just met Mr. Wellman for the first time at the Salem office the day before Thanksgiving, and I remember it was the day before Thanksgiving because I was on my way to spend Thanksgiving at Eugene, and I stopped in at the Salem office to visit. We don't see each other face to face in our office.

Mr. Wellman came to the Hillsboro office—when he came to the Hillsboro office it was so soon after that that it was very definite in my mind. We do not very often meet the growers in the Hillsboro office; that is, in the office, because they do not come to the office very often.

Q. Did you see Mr. Wellman in the Hillsboro office on other occasions after that, or early in December?

A. Yes, he and Mr. Kever called several times, several times in the course of the next few months.

Q. Was there any conversation between Mr. Kever, Mr. Wellman and Mr. Ray?

A. Yes, but——

Q. Did you hear any conversation between Mr. Kever and Mr. Wellman [220] and Mr. Ray?

A. Not so well. It is very difficult to hear Mr.

(Testimony of Emma L. Townsend.)

Kever. His voice does not carry so well, and I didn't pay too much attention to those visits.

Q. Did you hear any conversation at all that you can remember? A. Yes.

Q. What conversation do you recall having heard?

A. Well, in substance, the purpose, seemingly, of those visits was to continue to inquire on Mr. Wellman's part—a continuing inquiry on his part whether or not we had been able to find an outlet for the rejected cluster hops, and also the contract had been written for the 1948 crop. Mr. Wellman had sold his farm and there was a discussion about the assignment of that 1948 contract.

Q. Do you recall any further discussions when Mr. Kever was there?

A. Mr. Ray reiterated the statement that we were trying to find an outlet for the rejected hops but had not been able to do so.

Q. Did you hear Mr. Wellman, on any of these occasions or visits, ask for or demand any money?

A. No, he did not demand any money then or at the first visit.

Q. Did you hear him ask for any money? Did you hear him ask why his cluster hops had not been paid for? A. No. [221]

Q. Prior to the time Mr. Wellman came to the office in December, did you hear Mr. Ray instruct Mr. Noakes to get Mr. Wellman's permission to

(Testimony of Emma L. Townsend.)

inspect and weigh his cluster hops without such being an acceptance? A. Yes.

Mr. Kester: Was she personally present at any conversation between Mr. Ray and Mr. Noakes?

Q. (By Mr. Kerr:) Did you hear Mr. Ray give such instructions to Mr. Noakes?

A. Yes, sir; I did.

Q. Where was Mr. Ray at the time?

A. In his office.

Q. How were those instructions given?

A. Over the telephone.

Q. Do you remember the date?

A. They were given to him several times and particularly the week of September 21st to 25th.

Q. How did you know Mr. Ray at that time was talking to Mr. Noakes over the telephone?

A. Because I, without doubt, placed the call or it was placed from my desk.

Q. Do you recall what Mr. Ray said over the telephone?

A. He said he must be sure to have Mr. Wellman's permission and understanding that the sampling, inspecting and weighing of his hops would not constitute delivery and acceptance. [222]

Q. Did you later receive or hear any report by Mr. Noakes concerning his having complied with that instruction? A. Yes.

Q. In what manner did you hear or receive such report?

A. He sent in the weight tally for the hops and,

(Testimony of Emma L. Townsend.)

by a phone conversation to Mr. Ray, he said he had received permission and that is what had been done.

Q. Is it customary in the course of business in your office in Hillsboro for Mr. Noakes to report periodically to you as to what he has done?

A. Yes, more or less.

Q. Do you recall whether or not you received a report from Mr. Noakes on this subject of permission by Mr. Wellman to weigh his hops without an acceptance? A. Yes.

Q. Do you recall receiving that report from Mr. Noakes? A. Yes.

Q. How did you receive that?

A. By telephone.

Q. Is it customary for the weight tallies or weight slips to be delivered to you from the field men who weigh the hops?

A. They come in by mail, come to my desk.

Q. Look at Exhibit 2 which is now being handed to you and state whether or not you recall having seen that? A. Yes, I did. [223]

Q. Note the word "rejected" in red pencil appearing on the front of the first sheet of that exhibit.

A. Yes.

Q. Do you know who put that on there?

A. I did.

Q. When?

A. Sometime between—when the fuggles were accepted and the clusters rejected, which was sometime the last week of October.

(Testimony of Emma L. Townsend.)

Q. Why did you write that on that weight sheet?

A. Because the Wellman contract had been settled by the acceptance of the fuggles and the rejection of the late clusters.

Q. Now, there will be handed to you Exhibit 3-J. Please examine that and state whether or not you personally made that out? A. I did.

Q. *Who* initial appears on the bottom of that?

A. My own initial, "T."

Q. On the basis of what information did you make out that Hop Sample Advice?

A. On the advice and reports from Mr. Noakes.

Q. Did that Hop Sample Advice cover tenth-bale samples? A. Yes.

Q. Of whose hops?

A. Of Otto Wellman's hops.

Q. Those are clusters?

A. Clusters and fuggles. [224]

Q. Will you refer to the comment on the lower portion of the Hop Sample Advice, Exhibit 3-J? Will you read that, please?

A. "These Wellman contract hops have been weighed, inspected and sampled preparatory to settlement, but no basis has been reached. Please note that these are tenth-bale samples on the clusters."

Q. Will you explain that comment to the effect that no settlement has been reached. What did you mean by that?

A. We had received Mr. Wellman's permission

(Testimony of Emma L. Townsend.)

—that is, Ray & Son, Inc.—to weigh and inspect and sample his late cluster hops preparatory to the samples being sent to the Washington, D. C., office of John I. Haas, Inc., for their decision on the quality, and I was notifying the sample room in the Haas office that these were not—that these late clusters had not been accepted and were not delivered on the contract at this time.

Q. Did you at any time hear Mr. Ray give instructions to Mr. Noakes to reject Mr. Wellman's 1947 clusters? A. Yes.

Q. When was that? A. In October.

Q. How were those instructions given?

A. By telephone, in the office.

Q. Were you present when Mr. Ray talked to Mr. Noakes over the telephone? A. Yes. [225]

Q. Where was Mr. Ray at the time?

A. In his office.

Q. At Hillsboro? A. At Hillsboro.

Q. How did you know he was talking at that time to Mr. Noakes?

A. Because I placed the call.

Q. Just what did Mr. Ray say at that time that you heard?

A. Instructions were to accept the fuggles, deduct what advances had been made on the Wellman contracts and reject the clusters.

Q. Do you recall whether or not Mr. Ray at that time stated why the clusters were rejected?

A. The clusters were rejected because they were

(Testimony of Emma L. Townsend.)

not—the quality was not up to contract specifications.

Q. Is that what you heard Mr. Ray say over the telephone?

A. Substantially. It was because of the quality.

Q. Did you thereafter receive any report from Mr. Noakes that he had rejected the cluster hops?

A. Yes.

Q. How did that report come in to you?

A. By telephone.

Q. From whom?

A. From Mr. Noakes at the Salem office.

Q. There will be handed to you, Mrs. Townsend, Exhibit 3-Y. I will ask you if you prepared that letter? A. I did. [226]

Q. Is that your signature on the letter?

A. It is.

Q. Will you read the sentence of the letter relating to the rejection of Mr. Wellman's clusters?

A. "The Wellman clusters, 193 bales, have been rejected as per instructions."

Q. That letter is addressed to whom?

A. Addressed to John I. Haas, Inc., Washington, D. C.

Q. On the basis of what information or report did you thus report to John I. Haas, Inc., that the Wellman clusters had been rejected?

A. A conversation with Mr. Ray in person and a telephone conversation with Mr. Noakes.

Q. Do you have charge of the entries in the

(Testimony of Emma L. Townsend.)

records of A. J. Ray & Son relative to insurance carried on hops? A. Yes, with assistance.

Q. What is the practice with relation to recording in these records hops which are taken over or accepted by A. J. Ray & Son?

A. When hops are accepted, we insure them.

Q. What type of records do you make out?

A. The date, the number of bales, the sample number, the grower's name and the price per pound and so forth.

Q. Was any such record or entry made with respect to the Wellman cluster hops? [227]

A. No.

Q. Why not?

A. Because the Wellman cluster hops had been rejected; they had never been accepted.

Q. You also maintain a so-called hop book?

A. Yes.

Q. What is the nature of that record?

A. That is a record of our delivery, a record of all hops that we handle.

Mr. Kester: May I ask if, during the recess or before this case is concluded, if Counsel will submit to us for inspection these various office records he is now referring to?

Mr. Kerr: Yes, we will be glad to.

Q. Do you know what entries have been made in such hop books with respect to the Wellman clusters?

(Testimony of Emma L. Townsend.)

A. No entries have been made because we never accepted the Wellman clusters.

Q. Why were no entries made in your hop books?
A. Well, because——

Q. Why were no entries made in your hop books with respect to the Wellman cluster hops?

A. Because they were rejected and never accepted on the contract.

Q. Was the balance of all hops accepted by A. J. Ray & Son for John I. Haas, Inc., in 1947 noted in those records?

A. All the hops accepted by them? [228]

Q. Yes. A. Yes.

Q. Was such a notation made for all hops accepted by John I. Haas, Inc., in 1947?

A. Yes.

Q. There will be handed to you by the Bailiff Exhibit No. 1-B, No. 1-B being a check. Will you state whether or not Mr. Noakes reported to you that he had written that check?

A. Yes, he did report to me.

Q. Do you recall how soon after the date of the check you received that report?

A. Either it would be sometime in the evening of October 28th or it would be the next morning, the 29th.

Q. Will you refer to Exhibit No. 1 and to that sheet which is the invoice, I believe. Do you find that? Did you receive that from Mr. Noakes?

A. Yes, sir; I did.

(Testimony of Emma L. Townsend.)

Q. Approximately when did you get that?

A. It would be in the mail, either the morning or afternoon of the 29th or the morning of the 30th. Sometimes there is a day's delay between Salem and Hillsboro, between the Salem and Hillsboro mails.

Q. What is that paper that you now refer to which is a part of Exhibit No. 1, marked "E" I believe?

A. This is an accounting that our field man, in this case [229] Mr. Noakes, made on the Wellman contract.

Mr. Kerr: That is all. Thank you.

Cross-Examination

By Mr. Dougherty:

Q. Ordinarily around the end of September or the first part of October, is that a pretty busy period in the Hillsboro office?

A. Always busy at my end. I am always busy at my end in the Hillsboro office.

Q. Did you have additional assistants at that time? A. No.

Q. You handle most of this work yourself, is that correct? A. Yes.

Q. I believe you said you do not very often see growers in the Hillsboro office. Does your Salem office have most of the contacts with growers?

A. They see them in person, yes.

Q. I believe you have been here while some of the other testimony was being taken? A. Yes.

Q. Do you remember mention of some letters that

(Testimony of Emma L. Townsend.)

were sent out on and following the 25th of September, 1947, to other growers, relating to the weighing-in of hops? A. Yes. [230]

Q. Do you remember whether or not you sent such a letter to Mr. Wellman?

A. I would not have seen all these letters, naturally, but no such letter was sent to Mr. Wellman because Mr. Ray made up the list of the ones that they should go to, and it was discussed the Salem boys were doing Mr. Wellman's that day and, therefore, that was done orally and not in writing to Mr. Wellman.

Mr. Kester: Counsel has submitted these books for examination, your Honor. May it be stipulated that such matters as appear in these books may be offered at face value without the witness identifying the books? There are some very important matters in here, I can see by opening and glancing at the books, with respect to matters that have been brought into the case. Naturally we do not want to inconvenience anyone.

The Court: You had better keep the lady here. It will just be another day.

Mr. Dougherty: Thank you, Mrs. Townsend.

(Witness excused.) [231]

CATHERINE MATHESON

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

(Testimony of Catherine Matheson.)

Direct Examination

By Mr. Kerr:

Q. Will you state your name, please?

A. Catherine Matheson.

Q. Where do you live? A. Portland.

Q. What is your occupation?

A. Secretary and stenographer for A. J. Ray & Son.

Q. How long have you been so employed by A. J. Ray & Son? A. Six years.

Q. In what office?

A. In the Hillsboro office.

Q. That is the company's office in Hillsboro?

A. Yes.

Q. The Bailiff will hand you Exhibit 12. I will ask you if you can tell whether or not you typed the letter of which that is a copy?

A. Yes, I did.

Q. Do you recall the occasion when you prepared that letter? A. Yes.

Q. Do you recall whether or not you prepared similar letters to other growers? [232]

A. Yes, sir; I did.

Q. Do you recall whether or not you were told not to send such a letter to Mr. Wellman?

A. Yes, I was told not to.

Q. Who told you that?

A. Mrs. Townsend.

Q. Did she say why?

(Testimony of Catherine Matheson.)

A. Yes. Well, I overheard her discussing it with Mr. Ray.

Q. What was it you heard Mr. Ray tell her?

A. Well, he said they were in Salem that day inspecting and sampling, and that it was not necessary.

Q. That it was not necessary to do what?

A. To write him a letter.

Q. Did you ever hear Mr. Ray talk with Mr. Noakes over the telephone relative to getting Mr. Wellman's permission to weigh his hops?

A. Yes.

Q. Do you recall about when that was?

A. Well, it would have been prior to when I wrote this letter, these letters.

Q. What did you hear Mr. Ray say?

A. Well, he insisted that he get permission of Mr. Wellman before he weighed them, and then that would not constitute an acceptance of the contract, on the hop contract.

Q. Where was Mr. Ray when you heard him in that conversation? [233]

A. In his office.

Q. Where were you?

A. In the other office, in the outer office.

Q. Do you recollect hearing Mr. Ray give instructions to Mr. Noakes to reject the Wellman hops?

A. Yes.

Q. How were those instructions given?

A. Well, he told him to accept the fuggles and to reject the clusters, on the telephone.

(Testimony of Catherine Matheson.)

Q. On the telephone? A. Yes.

Q. Where was Mr. Ray at the time?

A. In his office, and I was in the outer office.

Q. How did you know on this occasion that Mr. Ray was talking to Mr. Noakes?

A. The calls are always placed in the outer office, and you can hear very easily.

Q. Do you recall an occasion when Mr. Wellman called at the office in Hillsboro?

A. Yes, sir; I do.

Q. Do you recall about when the first visit was?

A. Shortly after Thanksgiving.

Q. How do you know or how did you know at that time that it was Mr. Wellman?

A. I asked Mrs. Townsend who that was, when he came in.

Q. Did Mrs. Townsend tell you? [234]

A. Yes, she said she had met him just a few days prior to that.

Q. Could you hear what was said between Mr. Ray and Mr. Wellman? A. Yes.

Q. At that time? A. Yes.

Q. Do you recall whether or not Mr. Wellman said anything about wanting payment for his hops?

A. No, he did not.

Q. You did not hear any such request?

A. Pardon?

Q. You did not hear any such request?

A. No, I didn't.

Q. Did you hear Mr. Wellman ask why he was not paid for his hops? A. No.

(Testimony of Catherine Matheson.)

Q. Do you remember now the gist of the conversation between Mr. Ray and Mr. Wellman at that time?

A. Yes. Mr. Wellman asked if he could find an outlet or a market for his hops, and he said he would do his best and see that John I. Haas, Inc., did their best, and he also asked Mr. Wellman to do his best to find an outlet on his own.

Q. You remember that conversation, do you?

A. Yes.

Q. Do you remember anything being said about a moral obligation? [235]

A. Yes, sir; I do. Mr. Ray said we had a moral obligation but certainly not a legal obligation.

Q. How do you account for the fact, Miss Matheson, that you now remember the visits to the office by Mr. Wellman? A. I don't understand that.

Q. Is there any particular reason why you happen to remember Mr. Wellman's visits to your office?

A. Yes. I had not been accustomed to seeing hops rejected and I was very much interested in his request.

Q. Mr. Wellman's request? A. Yes.

Q. Is that the first time that a grower, to your knowledge, had come in, a grower whose hops had been rejected? A. Yes, it was.

Mr. Kerr: That is all.

Mr. Dougherty: Thank you.

(Witness excused.) [236]

C. F. NOAKES

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. Will you state your name, please?

A. C. F. Noakes.

Q. Where do you reside? A. Salem.

Q. What is your occupation?

A. Manager of the Salem office of A. J. Ray & Son, Inc.

Q. How long have you been there? How long has that been your occupation?

A. Been with the firm for 36 years; been in Salem about 21.

Q. What are your duties as Manager of the Salem office of A. J. Ray & Son?

A. The duties are to buy and receive and weigh and ship hops that are purchased for the account of A. J. Ray & Son.

Q. Were those your duties in 1947?

A. Yes, they were.

Q. How many employees are there in the Salem office?

A. Including myself there are three.

Q. Who are the others, other than yourself?

A. Clifford Davis and Ronald Troxel.

Q. How long has each of them been in the office at Salem? [237]

(Testimony of C. F. Noakes.)

A. Mr. Davis has been there for, I would say, fifteen years, and Mr. Troxel eight or nine years.

Q. What are the duties of Mr. Davis, or what were they in 1947?

A. They are what you might call field men. They go out and contact growers, and they also mark hops for shipping, receive hops, make general inspection, and general hop work in the field.

Q. Was that true also of Mr. Troxel in 1947?

A. The same, yes.

Q. Did you visit Otto Wellman's yard of cluster hops in 1947?

A. Yes, I did. I was there late August; I think the 26th of August.

Q. What was the occasion of your going out there at that time?

A. Well, we were, more or less all of us, making a survey of the different yards in which we had contracts and also to see and confirm the information of what the crop would be.

Q. Were the cluster hops at that time being harvested in Mr. Wellman's cluster yard?

A. They were not.

Q. How about the fuggles? Were they being harvested? A. Yes, practically completed.

Q. Did you go out in the cluster yard with Mr. Wellman on that occasion?

A. I went down through the yard. He was not with me all the time. I had some other boys there

(Testimony of C. F. Noakes.)

and he wanted to talk to them, and I went through most of the yard alone. [238]

Q. Was Mr. Wellman at the yard when you were there? A. Yes.

Q. Did you have any conversation with Mr. Wellman at that time? A. Yes.

Q. What was it, if you remember?

A. Oh, about general crop conditions and one thing or another; reference to some advances that would be due on the cluster hops the first of September.

Q. What was the conversation with respect to those advances?

A. Well, we talked the crop situation over there. It looked like we might run into some difficulty, into some trouble; the hops might not measure up to contract specifications, and he was rather dubious whether he wanted to pick them or not or whether he would require any harvest advance. That was about the extent of it. He wanted to know what I thought of the yard in general, if he should go ahead and pick, and I told him if they were my hops it was my opinion that he should harvest at least some of them because any quantity that he did harvest, he could sell them on the market at that time or, anyway, when he marketed them he could realize more than the cost of harvesting.

Q. What was the condition of his cluster yard at that time, as you then saw it?

A. Well, let's see——

(Testimony of C. F. Noakes.)

Q. With respect to mildew infestation? [239]

A. There was considerable mildew all through the yard, but, however, there was only small sections that were reasonably free from infection.

Q. Could you at that time tell what the quality of his cluster hops would be in the bale?

A. No.

Q. Why not?

A. I don't think anybody could. It is impossible.

Q. Why?

A. You don't know what is going to happen to them. The condition of the yard can change overnight, and he might spoil them in curing or drying or baling or something of the kind, so you couldn't make any definite prediction what they would be after he had them baled.

Q. Did you make advance payment to Mr. Wellman on the occasion of your visit of August 26th?

A. No.

Q. Did Mr. Wellman later ask for a harvest advance on the clusters? A. He did.

Q. When was that?

A. I don't know just exactly when he made the request. I made the advance on the 6th of September. He apparently had not made up his mind that he did want to harvest the hops until such time.

Q. Did you make this advance payment on September 6th promptly [240] at his request?

(Testimony of C. F. Noakes.)

A. Yes.

Q. That was for what?

A. That was \$5,000. That was half of the advances we was supposed to make—that he was supposed to get on the cluster hops.

Q. Why at that time was only half of the required advances made to him?

A. Well, because it was apparent that he would not harvest sufficient hops to fill the estimated quantity called for in the contract.

Q. Did he specify \$5,000?

A. Yes, he said that was agreeable; yes.

Q. Did you have any other conversation with Mr. Wellman relative to payment of a discount or premium on his 1947 cluster hops by reason of leaf-and-stem content?

A. Repeat that, please.

Q. I will strike the question and I will reframe it.

Did you and Mr. Wellman talk at that time, around September 6th, about the price to be paid for cluster hops?

A. No.

Q. Did you have any conversaiton with him concerning his taking a lesser price than the contract price?

A. No.

Q. Were you instructed by Mr. Ray to obtain Mr. Wellman's permission to inspect and sample and weigh his cluster hops, without [241] such being an acceptance of those hops?

A. I did.

Q. When was it you received those instructions?

A. Either the 21st or 22nd of September.

(Testimony of C. F. Noakes.)

Q. And how were they communicated to you?

A. By telephone.

Q. Will you state just what the instructions were?

A. I don't know as I can remember the exact wording but the substance of it was to get things rolling with him—to get things started, that we would have to go through some of the hops to determine whether or not they would be of acceptable or suitable quality as covered by the contract, and he said it could be arranged to make an inspection so as to go through the representative tenth-bale samples of the crop; it would be advisable to go ahead and do it, and he so instructed me to do it, and I would have to have permission from the grower, not only Mr. Wellman but the rest of them, to do that, before we made such inspection.

Q. Did Mr. Ray say anything to you about your getting an agreement from Mr. Wellman that the sampling and inspecting and weighing of his clusters would not be an acceptance of those clusters?

A. A verbal agreement, yes.

Q. What did Mr. Ray tell you about that?

A. He said if that could be arranged that we were to go ahead and make the inspection, draw samples and to further the work [242] so as to not have to come back and duplicate it, and that he would send the tenth-bale sample in to Washington for their approval.

Q. You refer to an arrangement. What do you mean by an arrangement?

(Testimony of C. F. Noakes.)

A. Well, an agreement with the grower that that would be okeh with him.

Q. Did Mr. Ray tell you not to do it unless the grower agreed the weighing would not be an acceptance?

A. He said the grower would have to agree to it before we could do it.

Q. What samples of the Wellman clusters were taken before the tenth-bale samples were taken?

A. There were several type samples taken before the inspection was made.

Q. Do you recall who took those type samples?

A. Mr. Davis.

Q. Do you recall when they were taken?

A. The first one, I believe, was on September 13th; subsequent samples, I am not sure of the date.

Q. Were they taken before the tenth-bale samples were taken? A. Yes.

Q. What was done with the type samples that were taken before the tenth-bale samples were taken?

A. We kept a part of them in our office and sent the rest to Hillsboro. [243]

Q. By "We" you mean the Salem office?

A. The Salem office, yes.

Q. Did you later talk to Mr. Wellman about the sampling and inspecting and weighing of his hops without such being an acceptance? At any time did you talk to Mr. Wellman?

(Testimony of C. F. Noakes.)

A. Before we made the inspection, yes.

Q. When was that?

A. Either the 21st or 22nd of September, right in there. I do not recall just the exact date from memory: right in there.

Q. Had Mr. Wellman requested that you weigh the clusters?

A. Mr. Wellman came to the office and said he was very anxious to get away on a hunting trip and wondered if we could not come and make an inspection of his hops, and I told him the only way we could possible do it, as we did not have any acceptance of the type samples, I was willing to go through them, make an inspection, draw tenth-bale samples and send them for approval, and it would be in no way an acceptance of the hops.

Q. Did you say anything at that time to Mr. Wellman about weighing his clusters?

A. Yes. He said that would be agreeable.

Q. Did you say anything to him about weighing his clusters?

A. Only in the conversation. I said that we would weigh them at that time, to save taking the hops out in the warehouse at a later date, and it would also save us duplicating lots of work: if we would have to go back and weigh them, it would mean just [244] another day lost for us and we would rather do so at that time.

Q. What did you say to Mr. Wellman as to such

(Testimony of C. F. Noakes.)

sampling and inspecting and weighing not being an acceptance?

A. I told him it was no acceptance of them at all at that time, and we would have to send these samples in for approval by John I. Haas, Inc.

Q. Did you tell him where the samples would be sent?

A. Yes. I said they would have to go to Washington.

Q. Did you ask him whether or not it was agreeable? Did you ask him whether he was agreeable to your weighing the hops, without that being an acceptance? A. I did.

Q. Do you recall just what you said to him at that time?

A. Maybe not in so many words, but I told him we would like to weigh them, and it certainly would not constitute any acceptance of the hops because I had no authority to accept them under any conditions.

Q. Did you tell him that? A. Yes.

Q. What did he say when you told him you would weigh and inspect and sample the hops but that could not be an acceptance?

A. He said that was okeh, all right, to come ahead, and we made a date for it, for the work to be done.

Q. Did you say anything to Mr. Wellman at that time about the quality or condition of the hops as indicated by the type samples? [245]

(Testimony of C. F. Noakes.)

A. As I recall, I mentioned to him that they did not look very good, but the exact wording I would not know. I said they were not of very good quality.

Q. Did you discuss with him at that time anything about his taking a cut in price? A. No.

Q. Did you then agree upon a date for inspecting and weighing of these hops?

A. We did. We had to make a date that was agreeable to the dealer that had the other half of the crop, as we wanted to work them both together. There was a division to be made.

Q. What was the name of this other dealers?

A. S. S. Steiner Corporation.

Q. Did you communicate with the Oregon representative of the Steiner Corporation?

A. I told Mr. Wellman I would have to make an arrangement with Mr. Eismann, and I am not sure whether Mr. Eismann called me or I called him, but we had a conversation about the fact that he would go to Mt. Angel on September 25th.

Q. Was that a conversation with Mr. Eismann?

A. Yes.

Q. Is that Howard Eismann?

A. Howard Eismann.

Q. Was that conversation over the telephone?

A. It was. [246]

Q. What was the date of that conversation with respect to the time Mr. Wellman came in, the same day or some other day?

(Testimony of C. F. Noakes.)

A. It was one of those days, two or three days before the 25th, and it is not clear in my mind just when it was, but it was just two or three days before.

Q. Did you thereafter inspect and take tenth-bale samples of Mr. Wellman's clusters?

A. Yes.

Q. When was that? A. September 25th.

Q. Where?

A. Schwab's warehouse in Mt. Angel.

Q. Who was present at that time?

A. Well, Mr. Wellman, Mr. Davis and myself, and some representative of the Steiner organization, although they were in different parts of the warehouse, and then the warehouse crew.

Q. How were the bales of clusters of Mr. Wellman in the warehouse at that time divided between you and Steiner? How was the physical division made?

A. When warehousemen line hops up, they handle them two bales at a time on the truck, and they would take them out of the pile and they lined up two bales for us and two bales for Mr. Steiner and continued that split until they were all lined up.

Q. What did you do at that time with respect to the sampling of the bales, as to the procedure you followed? [247]

A. After the hops were lined up, we would go through them with triers and draw a sample handful out of each and every bale, and place that hand-

(Testimony of C. F. Noakes.)

ful of hops on the head of the bale, and then later on we would bring a handful of the hops out to the doorway, to the light, and we would make a comparison between the tryings out of each bale with the type sample we had that was drawn previously.

If there is no appreciable difference in the hops, we would take the samples in order. If there should be a difference in them, then we would segregate them and put the different qualities on one or the other—either the front end or the last end of the row. Later we would number those bales and then weigh them.

Q. You did draw tenth-bale samples at that time?

A. Yes.

Q. What did you do with those tenth-bale samples?

A. Compared them with our type samples and we wrapped them.

Q. How were they wrapped?

A. They were wrapped in 20-inch-square paper, and fastened with a staple.

Q. Each one was wrapped separately, was it?

A. Each one was wrapped separately.

Q. Then what was done with them?

A. Then, when the lot was completed, simply tie these tenth-bale samples up, wrap them up and express them to Hillsboro. [247]

Q. Other than putting the bale numbers on the bales, as you have testified, did you and your men put any mark whatever upon the bales of the Wellman clusters?

(Testimony of C. F. Noakes.)

A. I believe not. However, there is a State code number has to be put on the head of the bale before the State Inspector will draw his sample.

Q. Who puts that number on?

A. I believe it is the warehousemen who do that?

Q. Did you or your men do it?

A. We might have done a few, but not very many. If we did, it was just an accommodation for the warehousemen.

Q. You say that is a code number that is used by the Government, is that right?

A. It is a code number used by the Department of Agriculture to identify each lot, each lot that they sample. The grower has a code number and if he has more than one lot they are classified by letters.

Q. Were samples being taken by the Department of Agriculture men at the same time you were sampling the bales? A. They were.

Q. And their samples were for what purpose?

A. Their samples were taken to the Department of Agriculture testing laboratory for a leaf-and-stem count and seed.

Q. Do you recall who asked the State Department to make that inspection? [249]

A. We did.

Q. Did you have anything to do with the actual sampling of any hops for the Department of Agriculture? A. No.

Q. Then, other than the marking of the numbers

(Testimony of C. F. Noakes.)

on the bales, the Department of Agriculture code number, was any other marking put on these bales at that time?

A. There would be the warehouse lot number, and that would be put on by the warehousemen as the hops came into the warehouse.

Q. You had nothing to do with that?

A. Nothing.

Q. Did you or your men put any marking of John I. Haas or the Haas corporation on any of these bales? A. No.

Q. At the warehouse on the 25th, in connection with the sampling and weighing of these hops, did you have any conversation with Mr. Wellman about sending tenth-bale sample in to Washington, D. C.?

A. Yes. After we completed the work and wrapped the samples up, and wrapped the samples up into bundles, we were standing there talking about it, and he said, "Well,"—Again I told him we would have to send the tenth-bale samples in to Washington for their approval of the quality.

Q. What did he say?

A. He said, "Go ahead." [250]

Q. Is that the complete conversation you had with him at that time?

A. Oh, approximately, yes. We had been talking about other things, but that was all of any consequence.

Q. Did you tell him the Washington office would

(Testimony of C. F. Noakes.)

determine whether or not the hops were acceptable?

A. Yes.

Q. At that time, on September 25th, when you inspected the Wellman hops in the warehouse, had the official Department of Agriculture analysis of the leaf-and-stem content been made? A. No.

Q. Was a weight tally or weight sheet made up at the time you weighed the hops? A. Yes.

Q. Who made that out?

A. I believe I did.

Q. Do you know what you did with that weight sheet? A. Mailed that in to Hillsboro.

Q. How soon after the 25th did you mail that sheet in? A. It was mailed that evening.

Q. It was mailed to the Hillsboro office, is that right? A. Yes.

Q. After the 25th did you have occasion to take any additional samples of the Wellman hops in the bales?

A. Oh, considerably later we drew some samples because I felt [251] we might have a place to sell them and I wanted to send some samples to another dealer.

Q. When was that, approximately?

A. The forepart of February.

Q. February, 1948? A. Yes.

A. What did you do with those samples?

A. I turned them over to Mr. Frank Kennedy.

Q. For what purpose?

A. He said he would send them to San Francisco

(Testimony of C. F. Noakes.)

and see if they could not sell them along with some other samples of some other lots.

Q. Did you send any of those samples which you took in February in to the Hillsboro office?

A. No.

Q. Did you get any instructions from Mr. Ray to reject the Wellman cluster hops? A. Yes.

Q. When?

A. Somewhere—I don't know—along the 14th or 15th of February.

Q. What were those instructions?

A. The instructions were that they would accept the fuggles and pay for them, and they would not accept the cluster hops.

Q. Did Mr. Ray at that time tell you why they would not accept [252] the clusters?

A. He might have said because the quality was not acceptable. We both knew what they were.

Q. Do you recall what he did say to you?

A. Not exactly, Mr. Kerr, no.

Q. Do you recall whether or not he did tell you the reason for the rejection?

A. It was on account of the mildew damage and picking. That was in a general conversation, yes.

Q. Mr. Ray told you that, did he? A. Yes.

Q. How was that instruction given to you?

A. By telephone.

Q. Where were you when you received the instruction? A. In the Salem office.

Q. Did you then communicate that rejection to Mr. Wellman?

(Testimony of C. F. Noakes.)

A. I called Mr. Wellman's home the following day and they said he was not there. I left word for him to call me as soon as he returned, and I don't know—I think I was talking to his wife. She said she would tell him to call me as soon as he returned.

I called a few days later. I called two different times, and I said we would like to see him just as soon as Mr. Wellman returned.

Q. Did anyone tell you at that time where Mr. Wellman was? A. Not at that time, no. [253]

Q. When did you see Mr. Wellman?

A. The late afternoon of October 28th.

Q. Where was that?

A. In the Salem office.

Q. Did you at that time tell Mr. Wellman that his cluster hops would not be accepted?

A. Yes.

Q. Did you tell him his fuggle hops would be accepted? A. Would be accepted yes.

Q. Did you pay him for the fuggle hops?

A. I did.

Q. Did you say anything to him about deducting the amount of the advances on the fuggles and clusters?

A. I told him we would have to deduct all the advances made on the contract off the proceeds of the fuggle hops.

Q. Who was present at the time you had this

(Testimony of C. F. Noakes.)

conversation with Mr. Wellman on the 28th of October?

A. Mr. Wellman was there, Mr. Davis was sitting at an adding machine, adding up some weight slips, and of course I was at the desk. Mr. Troxel was in the sample room, but he wasn't exactly present in the main office.

Q. Mr. Troxel was not in the same room?

A. No.

Q. How close were the main office and sample room?

A. Just joining, just a doorway between them.

Q. What did Mr. Wellman say when you told him the cluster hops would not be accepted?

A. I believe he said something—"what was the matter with the clusters?" or something of the kind, and I told him they did not make the grade, they were of such quality we would not accept them under the contract, or could not accept them on the contract, but they would take the fuggles and I was ready to pay for them.

Q. Did he say anything else at that time?

A. He said "Just what would happen if I refused to deliver the fuggles?"

I told him I thought it would be foolish on his part; it would simply tie the whole deal up and he would maybe lose that 90-cent sale on his fuggles, which was not the thing to do.

Q. What did he say as to that?

(Testimony of C. F. Noakes.)

A. He thought a little while and said, "Well, go ahead. It is okeh."

Q. You are being shown Exhibit No. 1, consisting of several documents. Will you examine the check, which is Exhibit 1 with a "B" and state whether or not you wrote that check?

A. Yes, I did.

Q. What was the occasion of your writing that check?

A. The balance due, proceeds of fuggles, less all the advances made on the contracts.

Q. Did you give that check to Mr. Wellman on the 28th of October? [255]

A. Yes.

Q. Did he take the check?

A. Yes.

Q. He received it?

A. Yes.

Q. He accepted the check?

A. Yes.

Q. Did he take it away with him?

A. Yes.

Q. Will you examine another part of that exhibit, No. 1 with a "E," which is your invoice, I believe. State what that is, please.

A. That is an accounting of the 122 bales of fuggle hops, 23,158 pounds net at 90 cents, which amounts to \$20,842.20.

Advances on March 1st, \$5,000; May 1st, \$5,000, August 13th, \$5,000; and September 6th, \$5,000, making a total of \$20,000 advances that were deducted and it says here "Check No. S324, \$842.20."

Q. Who made that out?

A. I did.

Q. Personally?

A. Yes.

Q. When?

A. October 28th.

(Testimony of C. F. Noakes.)

Q. Did you give a copy of that or the original of that to [256] Mr. Wellman? A. Yes.

Q. At the time you gave him the check?

A. Yes.

Q. At that time did Mr. Wellman ask you to try to dispose of the cluster hops which you had rejected?

A. Yes, naturally he wanted to sell them.

Q. What did he say about that at that time?

A. Well, he said, "I certainly want to sell the hops." He had no use for them and he wanted us to dispose of them, for us to keep trying to sell them somewhere.

Q. Did he say whether or not he might sell them himself elsewhere?

A. I am not sure that he said anything about that at that time. Later he did.

Q. Did he say anything about that?

A. Later he did.

Q. Well, did you say anything to him about his seeing if he could sell them elsewhere?

A. I wouldn't say positively that I did. I think I can recall that I did, but I would not say that I did. I did later, however.

Q. On the 28th did you state positively at that time to Mr. Wellman that the cluster hops could not be or would not be accepted?

A. I most certainly did, yes.

Q. Did you state the reasons why they were not being accepted? [257]

(Testimony of C. F. Noakes.)

A. Yes. I would not want to quote his exact words or the exact words, rather but the substance of it was that the quality was such that they would not accept them on the contract, particularly on account of the picking and also on the mildew damage.

Q. Did you report to the Hillsboro office of A. J. Ray & Son that you had rejected the cluster hops, as instructed? A. Yes.

Q. When did you give them that report?

A. Later that same evening. I telephoned Mr. Ray, probably at home. It was 5:00 o'clock when Mr. Wellman was in our office or later.

Q. Did you later show some samples of hops to Mr. Wellman in the Salem office?

A. Yes, I think so.

Q. When was that, before or after September 25th?

A. That was at a later date. I don't know just when, but I can remember we were comparing samples in our office.

Q. Was that before or after the rejection of the hops on the 28th? A. That was after.

Q. After October 28th, was it? A. Yes.

Q. Do you remember what the occasion was?

A. No, unless we were comparing quality and one thing or another [258] and he wanted to see some samples, and I obliged him by showing him several samples, along with his own.

(Testimony of C. F. Noakes.)

Q. Do you recall the conversation you had with him at that time?

A. Not word for word, no. It is not very clear in my mind, but I can remember that we had these samples down and were looking at them, but that is about all, because I didn't pay too much attention to it. We were busy, and he wanted to see some samples, and I obliged him—I pulled the samples off the shelf and showed them to him, and he compared the qualities by the—compared the qualities of the different crops.

Q. Do you recall saying anything about Mr. Wellman's clusters, cluster samples, not being at the foot of the class?

A. Well, they were not the worst ones, by any manner of means.

Q. Do you recall telling him that?

A. Yes, I think so.

Q. Were they the best of samples?

A. They were not.

Q. Did Mr. Wellman ever ask you for payment for his cluster hops? A. Not once.

Q. Did he ever ask you why he had not been paid for them? A. No.

Q. Were you authorized to accept Mr. Wellman's cluster hops of 1947?

A. No, I was not. [259]

Q. Did Mr. Wellman ever offer you warehouse receipts covering his cluster hops? A. No.

(Testimony of C. F. Noakes.)

Q. Did you ever see such warehouse receipts?

A. No.

Q. Did he ever offer you a load check covering his cluster hops? A. He did not.

Q. Did Mr. Wellman at some time talk to you about selling his cluster hops other than to John I. Haas, Inc.? A. Yes, later on.

Q. When was that?

A. I can't recall the exact date. I know that we did talk about it.

Q. Was that before or after October 28th?

A. After.

Q. Do you remember the occasion?

A. Mr. Wellman came to the office a number of times—I would not say the exact times.

Q. Was it before December, 1947, do you think?

A. I believe it was yes.

Q. Do you remember what he said at that time about selling the hops?

A. He said he was very anxious to dispose of them and for us to use every effort to sell them, and I also told him—then he [260] asked if it would be okeh if some other dealer got some samples and I said, "Most assuredly," and I said, "You sell them to him if you can, too."

Q. Is that the full conversation?

A. Approximately, I think.

Mr. Kerr: That is all.

(Testimony of C. F. Noakes.)

Cross-Examination

By Mr. Dougherty:

Q. You are Vice-President of A. J. Ray & Son?

A. That is right.

Q. You are a Director of A. J. Ray & Son?

A. No, I didn't think I was. I was not aware of it if I was. I am Vice-President anyway.

Mr. Dougherty: Is he a Director?

Mr. Ray: Yes.

Q. (By Mr. Dougherty): I understand you have been with A. J. Ray & Son for about thirty-six years? A. More than thirty-six, yes.

Q. You are now, and have been for many years, Manager of the Salem office?

A. About twenty-one years.

Q. About twenty-one years? A. Yes.

Q. As manager of the Salem office do I understand your duties [261] are to buy and receive and ship hops for A. J. Ray & Son? A. Correct.

Q. And for the Haas corporation?

A. A. J. Ray & Son represent the Haas organization, yes.

Q. Did you negotiate this particular contract with Mr. Wellman? A. Yes.

Q. That was in 1944, was it not?

A. In February, 1944, yes; yes, sir.

Q. Were the rest of the contracts drawn up at that time?

A. Yes, covering five crops; 1944, 1945, 1946, 1947 and 1948.

(Testimony of C. F. Noakes.)

Q. Did each contract contain the same provisions?

A. Yes, only they were for subsequent years.

Q. Naming a separate year? A. Yes.

Q. The printed form of contract, did Mr. Wellman provide that?

A. No, it came from our office.

Q. The typewritten rider on the contract, who prepared it? A. I did.

Q. You prepared it?

A. Yes. We wrote that out in our office. It was probably a form that we had been using on the contracts. The original came from Hillsboro.

Q. Were all of these contracts signed at the same time? A. Yes.

Q. Was the negotiation of all of these contracts one transaction? [262] A. Yes.

Q. In 1947 did you see Mr. Wellman's fuggle and cluster yards?

A. Yes, I was at the yards in late August, the 22nd, I believe.

Q. How would you describe the care and cultivation of the yard? A. Very good.

Q. When you were there in August did you notice there was some mildew? A. Yes.

Q. In the clusters? A. Yes.

Q. Was that pretty uniform over the yard?

A. Some sections were worse than others, but there was some infection all through the yard, yes.

Q. From your examination of Mr. Wellman's

(Testimony of C. F. Noakes.)

yard would you say that this so-called selective picking would have been feasible or practicable?

A. Well, it depends on what you mean by "selective picking." If you mean to go ahead and pull off a cone and look down and drop it in the basket, of course that would have been most impractical and everything else. Sometimes we use the term "selective picking" when they simply go through and drop off the lower hops. That might be termed "selective picking." If there were some good vines throughout the yard, you would go and pick those vines and leave the bad ones.

Q. Did any of those situations apply to Mr. Wellman's yard that [263] year?

A. Yes. There were vines throughout the yard that were not badly affected with mildew.

Q. But there was some mildew throughout the yard, is that correct? A. Yes.

Q. Did you advise him to pick his clusters in this so-called selective manner? A. No.

Q. Did you tell him not to pick his clusters?

A. No.

Q. The mildew that you saw was towards the end of August. Was that likely to improve after that time and before picking?

A. No, it apparently got materially worse. It would not improve to any extent. That is something that might stand still or the infection might spread over the rest of the yard.

Q. It might get worse overnight?

(Testimony of C. F. Noakes.)

A. It might get worse overnight, yes.

Q. But it was not likely to get any better?

A. It would not get no better; no.

Q. With reference to picking his clusters, did you advise him to do the best that he could?

A. Positively so, because I remember he was talking about it and said, "We will have to do the best job of picking we can to get them by at all."

Q. To your knowledge, do you know of any grower in the Willamette Valley in 1947 who indulged in selective picking?

A. Yes, I think there were some, some of the growers that left scattered vines and some that left whole sections of the yard.

Q. Were there any that had their hops picked cone by cone? A. No.

Q. What is the principal factor in producing what has been called "dirty picking"? Does that result from a condition of the vine?

A. No, it is the class of labor that is doing the harvesting.

Q. The class of labor? A. Yes.

Q. When you were out at Mr. Wellman's hop-yard on the 26th of August, do I understand you were making a survey at that time?

A. Yes.

Q. That that was in connection with the yards with which John I. Haas, Inc., had contracts?

A. Mostly, yes.

(Testimony of C. F. Noakes.)

Q. Did you look at Mr. Wellman's fuggles that were in the bin there?

A. I believe I did, yes.

Q. Did you walk out in the cluster yard?

A. Yes.

Q. On September 6th I believe you said you made the advance [265] to him on the picking, the picking advance on the clusters, to Mr. Wellman. Is that correct? A. That is right.

Q. Did Mr. Wellman at that time suggest how much of an advance he would need?

A. He agreed on \$5,000.

Q. Did Mr. Wellman say that was what they would need?

A. He said he thought that would get him through the harvest, yes.

Q. On or about September 11th did Mr. Wellman call you on the telephone and tell you what he selected as the growers' market price?

A. I believe that he did, yes. I am quite sure of it.

Q. What did he select as the growers' market price?

A. We had quite a bit of conversation on the phone. He asked me what the price of hops was and what the market was at that time, and I told him, as far as his contract was concerned, that we could get him 90 cents for his fuggles and possibly 85 cents for his clusters, and that of course they would have to come up to contract specifications.

(Testimony of C. F. Noakes.)

Q. Was that price all right with Mr. Wellman?

A. He agreed to it, yes.

Q. Was that the actual market price at that time? A. I believe so, yes.

Q. Was there any conversation about John I. Haas, Inc., insisting [266] that this be in writing?

A. No. Mr. Wellman asked if it was necessary to put it in writing, and I told him I didn't think it was necessary; that we had not done it in previous years, and it would mean a trip back home or to Mt. Angel, and I said, "If that is okeh with you, it is all right with me." A good share of our business is done that way.

Q. How long did that market continue at 85 cents on 8 per cent clusters and 90 cents on fuggles?

A. We bought clusters up pretty near to the middle of November, prime clusters, at 85 cents, I am sure. The fuggle market—I don't think we bought any. The fuggle market as a rule drops first, if there is any drop in the market, because they take a rather selective market for fuggles.

Q. Would you say the market was active or inactive? A. Very active.

Q. Very active? A. Yes.

Q. In August, 1947, among the trade, generally was it understood that there would be much of a crop or a small crop in Oregon?

A. The crop was very large. Everybody knew

(Testimony of C. F. Noakes.)

that. There was some anticipation and wondering about how many would be harvested.

Q. A very heavy set of hops that year? [267]

A. Very heavy, one of the largest, and one of the best crop prospects the State of Oregon has ever had.

Q. However, after the mildew hit, it was understood that there would be actually a short crop, short crops, produced, is that correct?

A. Yes, actually harvested; yes.

Q. Around about September 11th was there a very active market in clusters?

A. About the same. The thing had leveled off then. 90 for fuggles and 85 for clusters, that dragged along, as I remember, for a week or ten days.

Q. The growers who were not tied up on contracts, did they have any difficulty selling them? Did they have any difficulty selling hops at those figures?

A. If they had the quality that the buyer wanted, they would have no difficulty in selling them.

Q. Where did Mr. Wellman take his 1947 fuggles and clusters?

A. He delivered them to Schwab's warehouse in Mt. Angel.

Q. Was that place acceptable? A. Yes.

Q. Was it convenient to take them there?

A. Acceptable, yes.

(Testimony of C. F. Noakes.)

Q. Had he taken them to the same place in prior years under the same series of contracts?

A. Yes. [268]

Q. Did you inspect, sample, mark and weigh the hops, both fuggles and clusters, in Schwab's warehouse on or about September 25th? A. Yes.

Q. Were you the chief inspector? Were you in charge of that operation?

A. I had been in charge of the work, yes.

Q. Was the division of the hops between you and Steiner acceptable? A. Yes.

Q. Was that done in a proper manner?

A. Yes.

Q. As a matter of fact, Steiner ended up with a part of the fuggles, isn't that correct?

A. Not through any action of ours. I believe the Steiner organization bought those hops later. We didn't sell them to him; that is, Ray & Son did not sell them to him.

Q. Did you, acting for John I. Haas, Inc., request a Government inspection of the leaf-and-stem content of these hops? A. Yes.

Q. Was that inspection made at the same time you were there at Schwab's warehouse?

A. Yes.

Q. Did you observe that being made?

A. Yes. [269]

Q. Was it made in the ordinary manner?

A. Yes.

Q. Was there anything unusual at all about the

(Testimony of C. F. Noakes.)

way that inspection was made? A. No.

Q. How many samples did they take? How many samples does the Government inspector ordinarily take?

A. It is governed somewhat by the size of the crop; approximately every seventh bale.

Q. Approximately every seventh bale?

A. Yes.

Q. Do they have a tubular inspection tool?

A. They have a long tubular affair that they force into the bale; it has a plunger in it and they force the cylinder into the bale and draw out the sample, and they force this sample into a cardboard carton, a cardboard container.

Q. At the time these clusters were divided between you and Steiner, was the warehouse number on them? A. Yes.

Q. How about the Government code number? Who put it on? Was the Government code number put on them?

A. Not until they were lined up.

Q. Was the Government code number put on at that time, then?

A. Well, they were lined up. The State requires that a code number has to be on them before they will draw their samples, [270] before they will make their inspection.

Q. What is the object of that requirement?

A. They want to be sure that the identifying code number is on the bale when their sample is taken.

(Testimony of C. F. Noakes.)

Q. So they can subsequently identify the bale and the sample together, is that correct?

A. That is right. The same number has to be on this cardboard container as is on the bale.

Q. Did you number the bales that you looked at? Did you number them on the head?

A. Yes.

Q. Did you at any time place any brand number on any of these bales? A. No.

Q. They were numbered; also, the fuggles were numbered?

A. But no identifying brand or mark.

Q. There was no J. I. Haas, Inc., mark?

A. No.

Q. On the fuggles? A. No.

Q. In these cases where you actually put on a brand, the Haas corporation brand, isn't that usually done——

A. When we make shipment.

Q. ——when you make shipment?

A. Yes. [271]

Q. Did you at that time take tryings out of each bale?

A. Yes, after they were lined up.

Q. Did you have the so-called type samples there? A. Yes.

Q. Where did those type samples come from?

A. They were drawn previously by Mr. Davis

(Testimony of C. F. Noakes.)

out of the Wellman hops, there in the warehouse at Mt. Angel.

Q. Had splits of those been sent to Haas in Washington, D. C.?

A. I suppose so, yes. We sent them to Hillsboro.

Q. You have the remaining split, is that correct?

A. We draw them in pairs out of the same bale. We keep one and send them the full sample to Hillsboro. They are right side by side. It would be impossible to draw a sample large enough for us to take a split and Hillsboro have to have a split and send the rest to Washington, so we take two.

Q. Did you compare the tryings with the type samples? Did you do that in a corner of the warehouse? A. At the doorway.

Q. You took them to the light, is that correct?

A. Yes.

Q. Is that a common practice in inspecting hops? A. Yes.

Q. Is it common practice to inspect hops under artificial light?

A. Not warehouse light, no. We have lights in the sample room under which we do some work, but they would not be in the warehouse. [272]

Q. How did the tryings match up with the type samples?

A. They were similar, with the exception of one bale; quite similar. Let me qualify that. We had

(Testimony of C. F. Noakes.)

one small lot that was much better than any of the subsequent samples. Then, when we made our inspection we could only find that one bale; there was no more others like it.

Q. Did you thereafter discover that particular lot in sampling?

A. I asked Mr. Wellman if there was any way he could keep that separate and he said no, so we bunched them all together.

Q. Did you then select certain tryings that matched up quite well with the type samples?

A. Yes, we tried to get them more or less uniform. If there was a sample that was entirely different, then we segregated it.

Q. Did you then take your tenth-bale samples from those particular selected bales?

A. Yes, we drew the samples from those bales.

Q. Did you select these bales at random, or did you take samples from particular bales?

A. We did not adhere strictly to drawing samples out of bales which would be, numerically, 10, 20, or 30, like that. We drew our samples and tried to get representative samples of the crop rather than have them strictly adhere to certain numbers.

Q. You say "representative samples." Do you mean you tried to [273] get tenth-bale samples that compared as nearly as possible with your type samples? A. Yes.

(Testimony of C. F. Noakes.)

Q. Unless there was a material variation, is that correct?

A. If there were no material variation, we classed them all as equal to the type sample.

Q. Did you reject any single bale at that time?

A. No.

Q. You set out no single bale?

A. No, only this one bale we were talking about.

Q. Did you weigh in the hops?

A. Didn't weigh them in, no. We weighed them.

Q. You did weigh them?

A. Yes, we weighed them.

The Court: We will adjourn now until 10:00 o'clock tomorrow morning.

(Thereupon adjournment was taken until 10:00 o'clock a.m., February 2, 1949.) [274]

10:00 o'Clock Wednesday, February 2, 1949

C. F. NOAKES

a witness on behalf of Defendant, having previously been duly sworn, resumed the stand and further testified as follows:

Cross-Examination

(Continued)

By Mr. Dougherty:

Q. Mr. Noakes, you say you have been with A. J. Ray & Son for over thirty-six years, is that correct? A. That is right, yes.

(Testimony of C. F. Noakes.)

Q. During that time over how long a period have you done business with Mr. Wellman?

A. Oh, ten or twelve years.

Q. Have you ever made any spot purchases of his hops for John I. Haas, Inc.? A. Yes.

Q. In this series of contracts were you the one who contacted Mr. Wellman?

A. To make this contract deal, you mean?

Q. Yes, this series of contracts. A. Yes.

Q. Were you in general charge of the servicing of these contracts? A. Yes. [275]

Q. Were you in charge of obtaining chattel mortgages and recording them?

A. That was done through the Hillsboro office.

Q. Through the Hillsboro office? A. Yes.

Q. In prior years, for example 1946——

A. Mr. Dougherty, I don't know as I understood that other question exactly. I mean that the Hillsboro office filed the contract, the chattel mortgage and contract, with the court. Is that the question?

Q. Yes.

A. That is what I understood; yes. The Hillsboro office filed those contracts for public record.

Q. In 1946 did you agree with Mr. Wellman as to the growers' market price under his contract?

A. I believe so, yes.

Q. In all of those years were advances made by you or through your office?

(Testimony of C. F. Noakes.)

A. Yes. Sometimes by check from Hillsboro; other times by check from our office. That is, we delivered them and obtained a receipt, our office.

Q. Did John I. Haas, Inc., to your knowledge, ever object in any way to the manner in which you handled the Wellman contracts? A. No.

Q. Did anyone else representing John I. Haas, Inc., to your [276] knowledge, ever talk or write to Mr. Wellman?

A. Not to my knowledge, no.

Q. If any problem arose under the contract, would he call on you?

A. It would be referred to me, yes.

Q. This telegram, marked Exhibit No. 5, from John I. Haas, Inc., making certain suggestions concerning the handling or weighing in, that telegram is dated September 25th, is it?

A. Yes, sir.

Q. Had you ever seen that telegram before?

A. No.

Q. Did you see any of the original correspondence between A. J. Ray & Son and the Haas corporation? A. Well, relative to it?

Q. Yes. A. No.

Q. All of that was handled through Mr. Harold Ray, is that correct?

A. Yes; at least through the Hillsboro office, yes.

Q. Any special instructions which you might

(Testimony of C. F. Noakes.)

have would come from Mr. Harold Ray personally, is that correct?

A. Yes, or A. J. Ray & Son's Hillsboro office.

Q. Outside of such special instructions as you might receive from Mr. Ray or from his office, did you handle the 1947 transaction with Mr. Wellman in the same manner that you had handled [277] transactions in prior years under that same series of contracts? A. Yes, I believe so.

Q. With reference to Mr. Wellman's 1947 clusters, I believe you inspected them at the warehouse, did you? A. Yes.

Q. And also saw them in the yard?

A. Yes, at one time.

Q. What?

A. At one time I saw them in the yard.

Q. Would you say they contained some mildew?

A. Yes; they were affected by mildew.

Q. Would you describe them as being large, flaky hops of a greenish color? A. Yes.

Q. Would you say they were filled with lupulin?

A. I believe they were, yes.

Q. Would you say they had quite a good flavor?

A. They did.

Q. Were they—Would you say they were by no means the worst hop you saw in 1947?

A. No, they were not the worst hops.

Q. On the other hand, would you say they were not quite the best hops?

A. No, they were not the best by any manner of means.

(Testimony of C. F. Noakes.)

Q. Mr. Noakes, is it customary for you to demand warehouse [278] receipts from growers before you pay for hops? A. No.

Q. Is it customary for you to demand or receive load checks before you pay for your hops?

A. No.

Q. Did you at any time ever ask Mr. Wellman for load checks on his 1947 clusters?

A. No.

Q. Did you ever at any time ask Mr. Wellman for warehouse receipts on his 1947 clusters?

A. No.

Q. Would it have been normal procedure for you to have asked him for his warehouse receipts?

A. Not until we were ready to pay for them.

Q. Do I understand that the Haas corporation took in some mildewed hops in 1947 under these so-called prime-quality contracts?

A. I won't say that they took them in on the contracts. They handled some hops that were mildewed, yes.

Q. Were those hops that were mildewed from growers who had these so-called prime-quality contracts?

A. That would be right, yes. They are all alike. All the contracts are alike.

Q. In some cases were growers paid the full contract price for those mildewed hops?

A. Yes. Maybe hops can be affected by mil-

(Testimony of C. F. Noakes.)

dew and have some [279] other redeeming features.

Q. Would you characterize a hop that was well filled with lupulin and had quite a good flavor as a hop which had redeeming characteristics?

A. If it did not have too bad faults from some other source, yes.

Q. Were some of these mildewed hops which the Haas corporation handled, were they taken at some reduction from the contract price?

A. Some of the deals we didn't accept hops on the contract. We took them over at a reduction in price.

Q. But, in all of these cases, they were hops which were under contract? A. Yes.

Q. And subsequently the Haas corporation took those hops? A. Some of them, yes.

Q. The floor contracts which were written before the OPA went out, you still had some of those contracts left in 1947, did you? A. Yes.

Q. Did those contracts specifically refer to a sliding scale up and down from 8 per cent?

A. Not the ones that were written before OPA came into effect, no. There was no occasion to put any sliding scale for picking, as we had no method, official method, of determining leaf-and-stem count before 1944. [280]

Q. That sliding scale was used under OPA?

A. It affected those contracts when it came to the market price, yes.

(Testimony of C. F. Noakes.)

Q. Do I understand when you speak of an 85-cent market you mean an 85-cent market with an 8 per cent pick? In 1947 that was true of cluster hops? A. Yes.

Q. So you applied the sliding scale, although the contract did not contain the specific provision for it?

A. Yes, because that was the procedure or the custom in the market in that year.

Q. These instructions that have been mentioned concerning weighing-in Mr. Wellman's 1947 clusters, did you receive those from Mr. Harold Ray personally? A. Yes.

Q. Was that by telephone? A. It was.

Q. And when was that? When did you receive those instructions by telephone?

A. Sometime late September. It was getting along towards the end of the month. I don't know the exact date.

Q. Was that several days before the 25th?

A. Yes. We were talking about it at different times before that just how to proceed under those conditions.

Q. How did Mr. Ray explain those suggestions to you? Did he [281] assign any reason for them?

A. Yes, he said the quality of the crop as a whole was of such quality that he couldn't—he could see no method whereby Ray & Son would take responsibility of accepting the hops because, after all, a large share of them would not be of prime

(Testimony of C. F. Noakes.)

quality or up to quality specifications in the contract.

Q. Would it be proper to say that the harvested hops showed the same mildew that the hops in the field had been showing for the past two months?

A. If it was in the field, it would show in the samples unless—if it was general in the yard, it would show in the sample, yes.

Q. Did he tell you to be cautious in this matter, and that he was going to telegraph Haas and suggest this new procedure?

A. Yes. We were talking about it. We were all wondering just what to do.

Q. Did he say that the crop had turned out to be larger than they had expected?

A. Not then. We had expected it. My estimate shows that I thought there would be 80,000 bales harvested in the state, and that was made in August.

Q. By "We" whom do you mean? A. J. Ray & Son?

A. The men in my office and myself.

Q. You mean at the Salem office?

A. Yes.

Q. Did he say that the hop had turned out larger than John I. [282] Haas, Inc., had thought it would? A. I don't know as he did.

Q. Did he suggest to you that the Haas corporation had overbought and would probably have to reject some of the hops? A. No.

(Testimony of C. F. Noakes.)

Q. Did he suggest to you that the market was uncertain and that the Haas corporation did not know whether it would accept or reject?

A. I don't recall that the market particularly was discussed at that time.

Q. Did he discuss the effect of the grain restrictions on brewers?

A. He said—Yes, we talked about that some.

Q. Did you see Mr. Wellman at any time between the 25th of September and the 28th of October?

A. I don't recall that I did, not after we left the warehouse over there. I don't think I saw him until the 28th.

Q. How were Mr. Wellman's fuggles in 1947?

A. Aside from the pick, they were a very nice hop.

Q. The picking, what was that, 9 per cent?

A. 9 per cent by official test, the State test.

Q. After applying this so-called sliding scale, would you say Mr. Wellman's fuggle hops were prime-quality hops, prime-quality fuggles?

A. Ordinarily, a hop, even under the compromise position and [283] with the OPA pick of 8 per cent, a 9 per cent hop would not have been a prime hop.

Q. Aside from the picking were they prime?

A. Yes, I believe so. I would say Yes.

Q. With respect to the rejection that you have testified to of Mr. Wellman's 1947 clusters, did you

(Testimony of C. F. Noakes.)

receive your instructions from Mr. Harold Ray personally?

A. Ask that question again.

Q. You have mentioned rejecting Mr. Wellman's 1947 clusters. Is that correct?

A. I said we did not accept them. It is the same thing.

Q. Did you receive your instructions on that from Mr. Harold Ray personally? A. Yes.

Q. Did he give you any particular specific reason for that action?

A. He said the picking and quality otherwise was such that they would not accept them.

Q. Is that what he said?

A. I believe so, or words to that effect.

Q. Is that what he said or are you just assuming he might have said that?

A. I think he said that. I know we talked about it. It possibly wasn't those exact words.

Q. Did he give any specific reason or did you, I mean, give any [284] specific reason to Mr. Wellman in that conversation?

A. On the 28th of October, you mean?

Q. Yes.

A. I think I said that the quality was not such, that they would not take them or would not accept them.

Q. Did you say that John I. Haas did not like them and would not take them?

A. I might have, yes, in the conversation.

(Testimony of C. F. Noakes.)

Q. You remember when your deposition was taken, Mr. Noakes? A. Yes.

Q. Just for the purpose of refreshing your memory, and reading from Page 62:

“Q. The decision of John I. Haas, Inc., not to take the hops, how was that communicated to you?

“A. By telephone from Mr. Ray.

“Q. Did they give any reason for not taking the hops?

“A. Not that I know of, no. That was not conveyed to me.”

A. That is possibly so.

Q. “Q. Did you tell Mr. Wellman why they didn't take them?

“A. I just said they were not acceptable.”

A. That is right.

Q. Then is it correct, as far as you now recollect, no particular reason was ever discussed?

A. Going back a year and a half, it is pretty hard to remember just exactly what you said, but I am sure Mr. Wellman understood [285] they were not taking his hops, because we talked about it, and it definitely was understood that the quality was such that they would not accept them. I know that.

Q. In the deposition you said that no particular reason was assigned.

A. I was assuming that he knew the condition of the hops. We were talking about something that both of us were fully familiar with.

(Testimony of C. F. Noakes.)

Q. As I understand it, Mr. Wellman thought he had some pretty good 1947 clusters, is that what you mean?

A. No, he never told me he thought they were pretty good clusters.

Q. You thought they were about average?

A. Pardon?

Q. Didn't you think they were about average?

A. I wouldn't say that I ever said they were about average. As I said before, there were some hops in the lots that were considerably worse than others and there were a lot of them that were a lot better. I don't know whether that makes an average hop of them, but I wouldn't think so. It is an average of something, that is true, but whether it is average quality or not, that is out.

Q. Were your instructions to take Mr. Wellman's fuggles only if he would consent to deducting both the cluster and fuggle advances? [286]

A. My instructions were that we were to take over the fuggles at 90 cents a pound and that we had to deduct all the advances, and close the deal.

Q. Supposing Mr. Wellman had not consented to that?

A. Then he would not have sold the fuggles.

Q. You would not have taken the fuggles?

A. Not if he would not deliver them, I certainly wouldn't have taken them.

Q. So, as I understand it, your instructions

(Testimony of C. F. Noakes.)

were to refuse to take the fuggles under those circumstances?

A. Wait a minute. You made an error. Please, again?

Q. As I understand your testimony, Mr. Noakes, your instructions were if Mr. Wellman did not consent to deduct both advances from the proceeds of the fuggles you were to refuse to take his fuggles, even though they were up to contract quality?

A. My instructions were that we were to deduct all the advances. I don't know whether the other question came up or not now. I wouldn't say that it did.

Q. Were your instructions not to proceed at all unless all the advances were deducted?

A. I don't think I had any instruction to that effect at all. They just told me that.

Q. Were they——

Mr. Kerr: Let the witness answer.

A. They simply told me that we were to deduct all the advances. [287] They did not tell me what might happen if he refused to do it. I had no definite instructions from anybody as to just how to proceed if he refused to deliver the fuggles.

Q. Your instructions, as I understand it, were that this was the way it had to be done?

A. That I had to deduct all the advances, yes.

Q. And you stated to Mr. Wellman if he did not do it that way he might lose the sale of his fuggles?

A. Yes, certainly.

(Testimony of C. F. Noakes.)

Q. You received those instructions from Mr. Harold Ray personally, did you?

A. No, that was my opinion, I said.

Q. No, not your opinion, but your instructions as to how you would handle this?

A. That I was to pay for the fuggles and deduct all the advances that were made on the contract. That was my instructions.

Q. From whom did you receive those?

A. Mr. Ray.

Q. From Mr. Ray? A. Yes.

Q. Going back to this telephone conversation you had with Mr. Ray several days before September 25th, with respect to weighing in Mr. Wellman's fuggles and clusters, did this conversation relate to both his fuggles and clusters?

A. Nothing said about weighing in the hops. The instructions [288] were that we could make an inspection of both the fuggles and clusters and draw tenth-bale samples, and weigh them, if necessary, if Mr. Wellman agreed, and then send all the samples in to the Hillsboro office for approval by Washington.

Q. Did that relate to both fuggles and clusters?

A. Yes.

Q. Related to both of them? A. Yes.

Q. Were you to get the grower's agreement before inspecting any of them? A. Yes.

Q. And were you to get the grower to agree that

(Testimony of C. F. Noakes.)

such inspection might be made without committing Haas in any way? A. Yes.

Q. And did Mr. Ray advise you the grower would have to agree to that before you could inspect the hops? A. Certainly, yes.

Q. If Mr. Wellman, for instance, had not so agreed, were your instructions to go ahead and inspect the hops anyway? A. No.

Q. If Mr. Wellman, for example, had not so agreed, would you have accepted the hops anyway? A. No.

Q. Were you instructed by Mr. Ray at that time that you had no authority to either accept or reject any hops? [289]

A. That has always been my instructions, ever since I have been with the firm for thirty-six years, yes.

Q. Do I understand, Mr. Noakes, you have never had any authority to pass on whether the tenth-bale samples coincided with the type samples?

A. Oh, yes. Then it became my job to see that the crop ran and was like the type sample.

Q. Suppose you found your tryings and your tenth-bale samples fully measured up to the type sample, have you ever had any authority to weigh in a crop of hops? A. Yes, certainly.

Q. As a matter of fact, you have always had that authority, haven't you?

A. Yes; if the type sample had been accepted,

(Testimony of C. F. Noakes.)

the quality of the type sample had been accepted; yes.

Q. Were you ever advised as to the opinion of the Haas corporation on those type samples prior to September 25th?

A. I never had any direct advice from them, no. My instructions all came through the Hillsboro office, from Mr. Ray.

Q. Did Mr. Ray tell you anything about these type samples before September 25th?

A. Yes, I remember he mentioned that they did not look very good, that is, the clusters, particularly.

Q. Did he tell you anything about what the Haas corporation thought about these type samples before September 25th?

A. I don't recall that he did. The only thing that might have [290] come up would be that the general over-all picture—there would have to be something done to get the ball rolling; we had a lot of hops, and a lot of work had to be done by the end of October, and we would certainly have to be getting on the job or, well, it would be impossible to get the work done. We had to figure out some way of overcoming the difficulty.

Q. Those instructions were given to you by Mr. Ray personally, is that correct?

A. About——

Q. Weighing in or, rather, not weighing in?

A. To make the inspection, draw samples and so on?

(Testimony of C. F. Noakes.)

Q. Yes.

A. He told me not to weigh in but to weigh the hops.

Q. So, then, you had an agreement with Mr. Wellman, on that, is that correct? A. Yes.

Q. Did you pay him any money or give him any other consideration for that agreement?

A. No.

Q. Did you reduce this alleged agreement to writing? A. No.

Q. Without such an agreement, would you have inspected his hops? A. No.

Q. Without such an agreement, would you have accepted his hops? A. No. [291]

Q. When did you get authority to impose this additional condition?

A. You mean about going through the hops and making an inspection and drawing samples?

Q. Yes.

A. Mr. Ray said that was about the only way we could possibly handle them.

Q. That is not a matter covered by your contract, is that correct?

Mr. Kerr: That is asking for a legal conclusion, a conclusion of law, your Honor.

The Court: He may answer.

(Question read.)

A. It is probably a procedure that deviates from the usual custom, but it was a very unusual cir-

(Testimony of C. F. Noakes.)

cumstance and we had to work out some way of getting around the difficulty.

Q. (By Mr. Dougherty): I believe you testified you had this conversation with Mr. Wellman about the 25th—no, about the 21st or 22nd of September?

A. It was a day or so before the 25th. I can't establish the exact date in my memory, no.

Q. I believe that September 21st was a Sunday?

A. Could have been. I wouldn't know.

Q. Do you think you were even in your office on Sunday?

A. No, and Mr. Wellman would not have been there, either. [292]

Q. Do you remember what you did on Monday, the 22nd? Did you go down to Harrisburg and take in Stroda Bros.' hops at Harrisburg that day?

A. I don't recall what we did during the day, Mr. Dougherty. I don't remember. I remember I was there in the afternoon.

Q. I beg your pardon?

A. I was there in the afternoon.

Q. By "there" you mean——

A. At the Salem office. I don't recall now what I was doing all day.

Q. Do you recollect what you did on Tuesday, the 23rd?

A. Not fully, no. I have had no occasion to look up what I did. I don't remember now, exactly.

Q. On Wednesday, the 24th?

A. The same condition applied there, also.

(Testimony of C. F. Noakes.)

Q. Did you go down to Schwab's warehouse in Mt. Angel on September 24, 1947, and examine the hops of E. J. Seaman & Son?

A. I don't recall that either, now.

Q. Do you remember those hops?

A. Yes, I remember the hops. That is, I remember some things about them.

Q. That was one of the hopyards that was badly blighted with mildew, wasn't it?

A. Yes, some mildew infection; yes.

Q. Was that one of the yards that you thought might be a complete [293] failure?

A. I didn't think it would be a complete failure because I made Mr. Seaman some advances—that is, part of his harvesting advances—late in August.

Q. This telegram, Exhibit 3-A, Mr. Noakes, does that mention the same Seaman crop that is referred to? A. Yes.

Q. You thought, did you, along in the middle of August, that that crop was so badly hit with mildew that it might be practically a failure?

A. That is dated August 13th. That could have been my opinion at that time.

Q. The Seaman hops did have some mildew still in September, did they? A. Oh, yes.

Q. The Seaman hops?

A. Yes, they did.

Q. That was one of the crops that was around 14 per cent pick, wasn't it?

(Testimony of C. F. Noakes.)

A. I don't recall the picking now. The records will show that.

Q. That was one of the dirty picked, badly mildewed crops that John I. Haas, Inc., took in under the contract that year, wasn't it?

A. I know they took the hops, yes.

Q. John I. Haas, Inc., did take the hops? [294]

A. Yes.

Q. Then, on Thursday, the 25th of September, did you inspect Mr. Wellman's hops in the Schwab warehouse? A. I did.

Q. Was that one of the first cluster crops you had inspected that year?

A. One of the earlier ones, yes, up to that time. It is just possible that we might have weighed some hops, and that there was no question about quality before that time. I don't recall from memory now whether we did or not. This is the first crop that went through under the arrangement of sending in tenth-bale samples.

Q. Seaman's crop that was weighed in the day before did not go through on that arrangement?

A. I don't recall that we weighed those Seaman hops that day, but we might have. I wouldn't say for sure.

Q. As a matter of fact, wasn't Mr. Wellman's crop the last crop that went through before the new arrangement went into effect?

A. No. No; I wouldn't say that. Mr. Wellman came to me and said he was very anxious to get

(Testimony of C. F. Noakes.)

away and wanted to know if we couldn't do something about it, and I said I thought we could. I said I had already talked to Mr. Ray about this proposition of getting tenth-bale samples and sending them in for approval and he said under those conditions he thought it best to go ahead. Then he gave me orders to that effect, that I go—— [295]

Q. Did Mr. Ray explain to you at that time that he had not yet had any telegram from John I. Haas, Inc., approving that procedure?

A. Certainly they had not approved them. I knew that.

Q. I beg your pardon?

A. I was certain he had. He said they had not approved of the samples, either the type samples or any other samples.

Q. I am sorry. I mean approval of this procedure about inspecting?

A. I don't know whether he said the Haas corporation had given approval of it. I don't recall that. He said simply that he thought that was the thing to do.

Q. So far as you know, this was Mr. Ray's own personal idea?

A. That could have been, although naturally I assumed he certainly had been in correspondence with the Washington office of the Haas organization, but at that time I did not know that.

Q. How long were you weighing up the Wellman hops on the 25th?

(Testimony of C. F. Noakes.)

A. Just about all day. 318 or 319 bales is a long day's job for three of us.

Q. What did you do after you finished weighing up? A. After weighing the hops?

Q. Yes.

A. Cleaned up, of course, around, and gathered the samples up and wrapped the samples and shipped them to Hillsboro, and again, after we wrapped the samples, I told Mr. Wellman we would have [296] to send these samples in for approval. He said, "Okeh, go ahead."

Q. Did he say he didn't care where you sent the samples?

A. I just said, "We have to send these in," and I assumed he knew where they were going. I am certain he understood that.

Q. After that what did you do?

A. Well, we probably had some conversation and then went on home. It was getting late in the afternoon.

Q. Did you have any telephonic communication with Mr. Ray that day?

A. That evening, probably. I wouldn't say positively. We generally talked practically every evening.

Q. You do not now remember any particular telephone conversation that you had with Mr. Ray the evening of September 25th?

A. I either talked that evening or the following morning to the Hillsboro office and told them we

(Testimony of C. F. Noakes.)

were sending the samples in and had mailed in the weight tally, and the regular procedure. It was more or less routine.

Mr. Dougherty: That is all.

Redirect Examination

By Mr. Kerr:

Q. Did Mr. Wellman say why he was in such a hurry on this date, sometime prior to September 25th, when he asked you to inspect his clusters?

A. Yes, he said he was very desirous of going away to go to [297] Eastern Oregon on a hunting trip.

Q. And he at that time asked you to inspect his clusters, is that right? A. He did; yes, sir.

Q. When the samples were taken at the warehouse by the Government men, did they make their analysis of these samples at that time?

A. No. The Department of Agriculture field men drew these samples and they took them in to the hop laboratory in Salem, and they would go through the lab in regular routine. That is, they have to take their turn as they come in, because they have seven or eight men in the field and all of them bring in samples from different sections of the country and they are listed as they come in, and then they take their turn in going through the lab.

Q. You stated you personally thought that the Oregon crop in 1947 would be about 80,000 bales. Will you state why you had that opinion.

A. The Oregon crop particularly was one of the

(Testimony of C. F. Noakes.)

best looking; set out in the ground earlier—one of the best looking throughout the growing season in July and the forepart of August. The vine growth was very good and all indications were that we were going to have a beautiful crop.

If it had not been for the mildew, the State of Oregon would have had over 100,000 bales of hops and my opinion was that [298] out of that better than 100,000 bales of hops the growers would harvest around 80,000 bales.

Q. Did the then prevailing high prices for hops have any bearing upon your belief that there would be about 80,000 bales?

A. Naturally, if the grower thought he could sell them for a profit he was going to expend every effort to harvest them. That is common sense. It was my thought that would build up the amount of hops harvested, regardless of the quality of them.

Q. What is your opinion as to whether or not the prevailing high prices for hops in 1947 caused growers to harvest hops not of good quality?

A. Yes. Some of them had left their yards and went back and picked more hops.

Q. That is, they went back and picked more hops by reason of what?

A. Because they thought conditions were such that they might be able to sell them. Some of them made a mistake when they did it, too.

Q. You said Mr. Wellman never told you in his opinion his 1947 clusters were of good quality?

(Testimony of C. F. Noakes.)

A. Not late in the season, no. After this mildew struck, Mr. Wellman knew full well what was coming, and he was very dubious about even trying to harvest them, and that is the [299] reason we mutually agreed between us we would hold up the advances until such time as he determined whether or not he wanted to go ahead.

Q. After the Wellman clusters were in the bale, did Mr. Wellman acknowledge to you they were not of good quality?

A. He certainly was not very proud of them. I heard him say that.

Q. You say he told you he was not very proud of them?

A. Yes. I can remember that.

Q. Did he say that after they were in the bale?

A. Yes.

Q. Do you recall when he made that statement to you?

A. Not exactly. That was just general conversation. I don't know exactly when he made that remark but I do remember of him making it.

Q. Did he make any other comment to you concerning the poor quality of his hops, after they were in the bale?

A. Other than just a conversation about them I don't remember any specific words that he said about them.

Q. You said to Mr. Dougherty that you told Mr. Wellman that he would lose the sale of his fug-

(Testimony of C. F. Noakes.)

gles if he did not permit the deduction of the cluster advances. What had Mr. Wellman said to you just prior to that?

A. He asked me—you mean—Yes, he asked me what I thought if he refused to deliver the fuggles, what would happen. [300]

Q. What would happen if he refused to deliver the fuggles?

A. Yes, what would happen, if it would have any bearing with John I. Haas, Inc., as to the clusters.

Q. Was it in response to that question by Mr. Wellman that you told him in that event he would lose the sale of his fuggles?

A. I thought it would be very foolish for him to try it, that he might lose the sale at 90 cents—might lose a sale of 90-cent fuggles, and it certainly would not have been good business.

Q. After you had this oral agreement with Mr. Wellman that the inspection and weighing of his hops in September, at his request, would not be an acceptance of those hops, did you have any conversation with Mr. Howard Eismann concerning such oral agreement between Eismann and Wellman?

A. The day Mr. Wellman was in the office I naturally talked with Mr. Eismann, because they had the other half of the contract, and we would have to get together to make the inspection, as there had to be a division in the hops, and I wanted

(Testimony of C. F. Noakes.)

Mr. Eismann's man there when that division was made, so that there could be no question as to the proper division of the hops, and Mr. Wellman went to Mr. Eismann's office and said that he was going to make this inspection.

Q. Who said that? A. Mr. Eismann.

Q. He said that to you, did he? [301]

A. Yes, and I said, "You are not accepting the hops now?" And he said, "No. It is agreed that is not an acceptance."

Q. Did he say with whom he had that agreement that it was not an acceptance?

A. He said Mr. Wellman had been in the office and he had talked to him about it.

Q. At that time did Mr. Eismann say to you whether or not he had an oral agreement with Mr. Wellman that the weighing of the hops by Mr. Eismann's man would or would not be an acceptance of the hops? A. Yes, he did.

Q. This was on what date, do you know?

A. Again, that was two or three days before the 25th. I don't know the exact date.

Q. Is that the same date that Mr. Wellman came to you with the request that you weigh the hops? A. Yes.

Mr. Kerr: That is all.

Recross-Examination

By Mr. Dougherty:

Q. As I understand it, then, Steiner and Haas

(Testimony of C. F. Noakes.)

were collaborating on this whole deal, is that correct?

A. I would say no, but there were certain details that had to be worked out together, since they had the other half of the [302] crop. We would not have liked it if Mr. Eismann had stepped in and taken out his portion of the contract and said, "You can have what is left." I certainly would not have done that to him either, so we figured we would both get together so neither one could possibly question but what a proper division had been made.

Q. Do I understand, Mr. Noakes, that you and Mr. Eismann were operating under some arrangement with respect to Mr. Wellman's clusters?

A. That is my understanding, yes. That was my understanding because I talked to Mr. Eismann about it. That is the way he was working the deal as he had no authority to accept the hops at that time either.

Q. When did you have this conversation with Mr. Eismann?

A. In the afternoon of the day Mr. Wellman was in the office, just a few days prior to the 25th.

Q. As a matter of fact, Mr. Noakes, you know, do you not, that Steiner did receive Mr. Wellman's cluster hops on that same date?

A. I don't know whether he received them or not. He weighed them the same day that we did. The deals in that respect were identical.

(Testimony of C. F. Noakes.)

What I mean when I say they were identical, he told me he had this same arrangement and that he was going to Mt. Angel and make this inspection and draw tenth-bale samples to send to his New York office for approval, and I asked him, "Are you going [303] to weigh them at this time?" And he said he was.

Q. It was agreeable with you to handle the matter in the same manner that Mr. Eismann was handling it?

A. It was agreeable the way I wanted to handle it, and according to my instructions—I don't know what instructions Mr. Eismann had from his office, or anything about it, only just the words that he told me, that he was going to do it, and that he was going there and going to make an inspection and draw his samples and that he would have to send samples in for approval, and at that same time he was going to have a field man there to weigh them.

Q. Was Mr. Wellman present at this alleged conversation with Mr. Eismann?

A. I believe when I talked to Mr. Eismann he was not in the office. I am not positive of that. I think I told Otto that he had better go over to Howard's office and make arrangements over there so that we could work together and I believe he was over there but I am not positive of that either. He was either there or in our office. I don't remember now just where he was. He was there during that conversation or came back shortly after.

(Testimony of C. F. Noakes.)

Q. You said that in August Mr. Wellman knew full well what was coming. What did you mean by that, Mr. Noakes?

A. Well, he knew there was going to be some bad quality hops in the state. We all knew that, because it was very evident that there was going to be a right considerable amount of damage [304] in the yards, mildew in most of the yards around the state; not all of them, but most of the yards around the state, and 1947 was unusual in this respect, that this mildew came on, this mildew attack came late in August, when under ordinarily circumstances we would have very dry weather in which mildew does not work, but it did happen that this was a very rainy August and it brought this attack on. It had not happened that way to any extent any time before, nor since.

Q. You knew that there was mildew damage, Mr. Wellman knew it, Mr. Ray knew it and Mr. Haas knew it, is that correct? A. Yes.

Q. At what price did 1947 future contracts start, in the early part of 1947? Did they start around 45?

A. There were some made in June and July, early July and June, I believe, at 45 cents with a sliding scale, with a premium for better picking and a penalty for poorer picking.

Q. After the mildew struck were higher prices offered by dealers? A. Yes.

Q. Did the market nearly double within approximately a month?

(Testimony of C. F. Noakes.)

A. I don't know whether it was that soon or not—no, not within a month, because within the forepart of August we wrote contracts at 65 cents.

Q. Did the market then go from 45 to 65, is that correct? A. It did. [305]

Q. And from 65 to 85? A. Later, yes.

Mr. Dougherty: That is all. Thank you.

(Witness excused.)

BERT W. WHITLOCK

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. Will you state your name and occupation?

A. Bert W. Whitlock. I am in charge of hop inspection work on the Pacific Coast for the Department of Agriculture, for leaf-and-stem and seed content.

Q. You testified in one of the two previous hearings in this court? A. Yes, sir.

Q. Can you state when the OPA regulations governing the ceiling prices for hops were out of effect?

A. I believe September 1st, 1946.

Q. There have been no OPA ceiling prices on hops since that time, is that right?

A. That is right. [306]

(Testimony of Bert W. Whitlock.)

Q. I believe you testified in the previous case that you are in charge of the Federal Government's determination of the leaf, stem and seed content of lots of hops? A. Yes, sir.

Q. Has your office, under your supervision, compiled the averages as to leaf-and-stem content, the average of the years 1946, 1947 and 1948?

A. Yes.

Q. Of Oregon hops?

A. Yes, and of the Coast.

Q. Will you state what percentage of the hops which your office thus analyzed in 1947, that is, the 1947 crop of hops, showed 8 per cent or lower leaf-and-stem content?

A. Out of a total of 80,675 bales there were 46,206 or 57.27 per cent that carried 8 per cent or less of leaf and stem.

Q. What was the percentage of the volume which you examined which showed 11 per cent leaf and stem? A. 11 per cent only?

Q. 11 per cent only. A. 6.68 per cent.

Q. What was the percentage as to 11 per cent or more, or do you have that figure?

A. I haven't that figured up. There were 82.95 per cent that were less than 11.

Q. 82.95 per cent? [307]

A. 82.95 per cent that ran less than 11 per cent. That would be 17.05 that were over 11 per cent and on up.

Q. Oregon cluster hops?

(Testimony of Bert W. Whitlock.)

A. Well, they are all hops. We don't divide them now.

I should say here that these figures of Oregon include 1,908 bales of Idaho hops—1,905 bales. In other words, 1,905 bales out of 80,675 were Idaho hops.

Q. Do you have the figures for 1946 on the same basis?

A. In 1946 we inspected 94,050 bales at Salem. The average leaf-and-stem content was 7.67. I do not have the percentages figured for those that went 11 per cent or over. As I understood, on 1946 you did not ask that.

Q. In 1947 what was the average leaf-and-stem content of the Oregon hops and the 1,905 bales of Idaho hops that you referred to?

A. The average for the crop as a whole was 8.09 per cent leaf-and-stem content in 1947.

Q. Do you have the 1948 figures?

A. Yes, in 1948 we inspected 81,679 bales and the average leaf-and-stem content was 7.2 per cent.

Q. In making these determinations of leaf-and-stem content do you include hops or hop burrs which are damaged by mildew? A. No.

Q. Do you have the averages for the Pacific Coast?

A. I do, yes, the over-all averages for the Pacific Coast. [308]

Q. Begin with 1947, please.

A. In 1947 there were a total of 248,522 bales

(Testimony of Bert W. Whitlock.)

inspected on the Pacific Coast. The average leaf-and-stem content was 6.42.

Q. And 1946?

A. In 1946 there were 265,516 bales, and the average leaf-and-stem content was 6.05 per cent.

Q. 1948?

A. In 1948 there were 245,891 bales and the average leaf-and-stem content was 5.75.

Q. Do you know whether or not the fuggle type of hops ordinarily has a larger leaf-and-stem content than the clusters?

A. I wouldn't know.

Q. You were brought here under subpoena, were you not? A. Yes, sir.

Q. You appeared under subpoena, I should say.

A. Yes.

Mr. Kerr: That is all.

Cross-Examination

By Mr. Dougherty:

Q. Do I understand that approximately one-sixth of the Oregon hops in 1947 were 11 per cent or higher of picking?

A. 17.05 per cent, yes, were 11 or over on leaf and stem.

Q. Do you have figures showing the difference between machine-picked hops and hand-picked hops?

A. No.

Q. Do you know whether machine-picked hops generally run less leaf and stem?

A. I believe, from our observation, that machine-

(Testimony of Bert W. Whitlock.)

picked hops do run cleaner than hand-picked hops, due particularly to labor trouble.

Q. I notice from the figures which you read that the Oregon percentages were higher than the Coast percentages. Is that customary?

A. It has been during the five years that the service has been in operation. The Oregon crop would run, oh, two or three per cent higher leaf and stem than California or Washington.

Q. Is that attributable to the fact that there are not so many picking machines available in Oregon?

A. That is the conclusion I would draw, yes.

Q. I notice that 1947 showed a higher average than either 1946 or 1948. Is that attributable to the labor situation in 1947?

A. Yes, I would say yes, to the labor situation and perhaps the condition of the crop that had to be picked. A crop that is mildew-damaged, it is more difficult to pick it clean. It is harder to get your pickers to do a clean job than if they are working on well-matured crops.

Mr. Dougherty: Thank you. [310]

Redirect Examination

By Mr. Kerr:

Q. When did this inspection service, set up by the Government in the determination of the leaf-and-stem content for Pacific Coast hops, begin?

A. 1944.

Q. There was no such service prior by the Government, prior to 1944?

A. No, sir.

(Testimony of Bert W. Whitlock.)

Q. With reference to the cause of the relatively higher leaf-and-stem content of the 1947 crop, would you say that the high prices for hops that prevailed at that time might have had an influence on the leaf-and-stem content?

A. I have no way of knowing.

Q. You would not want to draw that conclusion, then?

A. No, sir.

Mr. Kerr: That is all, then.

The Court: What was the price in 1948, by the way?

A. I have no data on prices.

Mr. Kerr: We will bring that out, your Honor.

The Court: Tell me.

Mr. Ray: Prior to harvesting, the market for the 1948 crop was 70 to 72 cents. Immediately after harvest time it was 65 cents. That was the highest price at which any market price contracts were settled. It declined steadily and continuously [311] until the present time when the average market is 28 cents for hops.

Mr. Kerr: Does that answer your Honor's question?

The Court: Yes.

(Witness excused.)

GILBERT DAVIS

was thereupon produced as a witness on behalf of the Defendant and, being first duly sworn, was examined and testified as follows:

(Testimony of Gilbert Davis.)

Direct Examination

By Mr. Kerr:

Q. State your name, please.

A. Gilbert Davis.

Q. Where do you live? A. At Salem.

Q. What is your occupation?

A. Hop buyer.

Q. By whom are you employed?

A. A. J. Ray & Son.

Q. How long have you been an employee of A. J. Ray & Son? A. Since 1931.

Q. Continuously since that time?

A. Yes, September.

Q. You were an employee of A. J. Ray & Son in August, 1947, [312] were you? A. Yes.

Q. What were your duties with A. J. Ray & Son?

A. I am considered a field man.

Q. Did you deliver certain advances to Otto Wellman in 1947? A. I did.

Q. Do you recall what those advances were?

A. Yes. It was two advances in the spring and one at harvest time. I delivered one advance at harvest time.

Q. Did you take the type samples of his cluster hops in 1947? A. I did.

Q. When was the first time you took type samples of Mr. Wellman's 1947 clusters?

A. I believe it was right close to the 13th of September.

Q. Where did you get the type samples?

(Testimony of Gilbert Davis.)

A. At Mr. Wellman's drier, where the hops was dried.

Q. Did you take the sample from the bale or from loose hops? A. From the bale.

Q. Do you recall how many bales of clusters there were on hand?

A. There might have been three or four baled out.

Q. Did you notice at the time how far along his harvest of the cluster crop was? You, I believe, made an inspection of the field at that time.

A. He was in the act of harvesting them.

Q. Was Mr. Wellman present when you took your type sample? [313]

A. Yes, he was present.

Q. Did you have any conversation with him at that time concerning the type sample?

A. I believe I did, yes.

Q. What was it?

A. I think it was a sample that was much better than average appearance that I drew out at that time that one sample.

Q. Did he make any explanation about it?

A. Yes. That was what was supposed to have amounted to 64 bales; that type sample was supposed to represent a total of 64 bales.

Q. Did he tell you it would represent about 64 bales? A. Yes.

Q. Did he tell you where the hops were that he referred to as being 64 bales?

(Testimony of Gilbert Davis.)

A. They were in the storeroom and dry-kiln.

Q. Had they been baled as yet?

A. They had not been baled.

Q. Was he referring, then, to unbaled loose hops? A. Yes, that is right.

Q. Did he say whether or not he had obtained those hops, which he estimated would be about 64 bales, by selective picking? A. Yes, he did.

Q. What did he say about that, if you remember?

A. Well, that he had started on one corner of the yard picking, [314] with a selected group of pickers, and that he estimated that there would be about 64 bales picked by them.

Q. Did you take other type samples later?

A. Yes, I did. I believe I took some at the farm and later I was sent to the warehouse at Mt. Angel where I drew others.

Q. When you were back the second time do you recall when that was?

A. I do not recall the date that I took those at the farm the second time, but it was after that first sample that I drew.

Q. When was the third time you took type samples?

A. That was at Schwab's warehouse at Mt. Angel.

Q. When was that?

A. Well, again I don't recall the exact date.

Q. When was it with relation to the time when you took tenth-bale samples? Was it before or after that? A. Well, it was before.

(Testimony of Gilbert Davis.)

Q. Were all of those type samples taken before the tenth-bale samples were taken?

A. Yes, that is right.

Q. What did you do with the type samples?

A. One full sample was sent to Mr. Ray's office in Hillsboro. We kept a split and it was put on record in our office.

Q. Did you take those type samples in the manner and in the quantity that you customarily take such samples? A. That is right. [315]

Q. Were they all taken from bales?

A. They were.

Q. Did you at any time advise Mr. Wellman to pick or not to pick his 1947 cluster hops?

A. I did not.

Q. Did you have any discussion with him at any time with respect to whether or not he should pick his clusters?

A. I made an inspection of his yard and we would talk about the condition of his yard. I at no time advised him to pick or not to pick. That was strictly up to Mr. Wellman.

Q. Did you at any time hear a discussion between Mr. Noakes and Mr. Wellman concerning the sending of samples of the Wellman cluster hops to Washington, D. C.? A. Yes, I did.

Q. Were you present when Mr. Wellman arranged with Mr. Noakes for the sampling, inspection and weighing of Mr. Wellman's cluster hops?

A. I was in the office.

Q. Where was that? A. At Salem.

(Testimony of Gilbert Davis.)

Q. Do you recall when that was?

A. I don't recall the exact date; no, sir. It was afternoon, late afternoon, I would say, in our office at Salem.

Q. In what month?

A. In September the latter part of September. It was before [316] the 25th.

Q. What was the conversation, as you now recall it, about sending samples to Washington, D. C.?

A. Mr. Wellman asked us, after our day's work on his hops—well, he wanted to get away and he wanted us to—he was anxious to get those samples out.

Q. What were you doing in the office at that time?

A. Well, we were finishing up our day's work and we were trying to clean up and get ready to go home.

Q. Whom do you refer to when you say "we"?

A. It would be Cliff Noakes and Ronald Troxel and myself.

Q. Do you recall where Mr. Troxel was when Mr. Wellman came in?

A. No, I do not, other than probably right there at the office. There are two rooms in our office, and I believe he was there.

Q. Do you recall whether or not he was in the sample room or in the main office?

A. I don't recall.

Q. Do you recall what Mr. Wellman said at the

(Testimony of Gilbert Davis.)

time with respect to his request that you inspect and sample and weigh these hops?

A. He said, "I want you to sample my hops," or possibly "work on my hops." That is what the subject was about. He said, "I want you to—" Well, it means an inspection, is what it is. He said, "I want you to go in and make your inspection in the hops."

Q. Did he say why he wanted it done right away?

A. He wanted to go away on this hunting trip.

Q. Do you recall what Mr. Noakes told him at that time?

A. He said, "Otto, we don't have your picking analysis. We cannot take the hops in unless we have that picking analysis on them."

Q. Do you recall what else Mr. Noakes said at that time?

A. He told Otto we would have to make our inspection of those hops, and send the samples to Washington.

Q. Did he say what was to be done with the samples in Washington?

A. I don't know that he said what is to be done. What was to be done, in my opinion, was for John I. Haas, Inc., to examine these hops.

Q. Do you definitely recall at this time that Mr. Noakes told Mr. Wellman on that occasion that tenth-bale samples would have to be sent in to Washington, D. C.?

A. I certainly do.

Q. Do you recall what Mr. Wellman said?

(Testimony of Gilbert Davis.)

A. He agreed that that would be all right. He was very anxious to get away, and that seemed to be the only way we could handle this deal, and he agreed that we could go into them.

Q. Did you hear all of the conversation between Mr. Noakes and Mr. Wellman at that time?

A. Oh, I would not say. I heard all the conversation, no. I know we were trying to get things cleaned up around the office to go home and I wouldn't say that I heard all the conversation. [318]

Q. Do you recall now just what you were doing in the office at that time, what you personally were doing then?

A. No, I don't. I suppose I might have been entering some of the day's figures. In fact, that is what we had been doing.

Q. Were you present when the hops were inspected and sampled on the 25th day of August?

A. I was there all day.

Q. Did you assist Mr. Noakes in making that inspection? A. Yes, sir; I did.

Q. Did you at that time hear any conversation between Mr. Wellman and Mr. Noakes concerning the sending of samples, tenth-bale samples, to Washington, D. C.? A. Yes.

Q. What was that conversation?

A. After we had completed our day's work and were tying these samples up in bundles, and expressing them to Mr. Ray, at that time Mr. Noakes said, "We will send these samples in to Washington for their approval."

(Testimony of Gilbert Davis.)

Q. You definitely now recall that statement by Mr. Noakes to Mr. Wellman at that time?

A. I certainly do.

Q. Do you recall what Mr. Wellman said at that time in response to that statement by Mr. Noakes?

A. I believe he just said, "Well, go ahead."

Q. Were you present when Mr. Noakes instructed—do you recall [319] hearing Mr. Noakes tell Mr. Wellman that Mr. Wellman's cluster hops were not acceptable?

A. Yes. I was at the office at that time.

Q. That was at what office?

A. The Salem office.

Q. Do you recall when that was?

A. It was on October 28th in, you might say, the afternoon, the late afternoon.

Q. Who was present at that time, if you recall?

A. In the room, Mr. Noakes, Mr. Wellman and myself.

Q. Did Mr. Wellman come to your office while you were there, or was he there when you got there?

A. I believe he was there; that is, he was waiting for us when we came in from our work.

Q. By "we" what do you mean?

A. Mr. Noakes and myself.

Q. Do you recall what Mr. Wellman said at that time when you first got there?

A. Well, "What have you got on my hops?"

Q. Is that what he said?

A. I believe so, or words to that effect.

(Testimony of Gilbert Davis.)

Q. What did Mr. Noakes do or say at that time, as you recall?

A. I believe Cliff sat down at his desk and wrote up his figures, what he had done that day.

Q. Did he say anything to Mr. Wellman at once?

A. Well, "Hello," and "You had a good trip?"—like that.

Q. After Mr. Noakes had worked at his desk, what did Mr. Noakes say or do, if you recall?

A. Mr. Noakes turned to Mr. Wellman and he said, "We can't take those late hops, Otto."

Q. Did he say anything else?

A. He went on to say that, "We can take the fuggle hops at 90 cents and we are ready to pay for them."

Q. Did he say anything about deduction from the price for the fuggles?

A. Yes, I believe that he told him at that time they would deduct all advances that we had made to Mr. Wellman on his contract.

Q. Do you recall whether or not Mr. Noakes said anything about deducting——

A. Mr. Noakes said, "We will have to deduct all the advances."

Q. Do you recall what Mr. Wellman said when Mr. Noakes told him he could not accept the clusters?

A. I believe Otto more or less asked the question; he said, "What if I retain the fuggles or hold them and don't turn them over to you?"

(Testimony of Gilbert Davis.)

Q. You now definitely remember whether or not Mr. Wellman made that statement?

A. Yes, I do.

Q. What else did he say? What was Mr. Noakes' response to that [321] statement by Mr. Wellman?

A. Cliff asked him if he wanted to pass up a 90-cent delivery, 90 cents on these fuggles.

Q. What did Mr. Wellman then say, if you recall?

A. Mr. Wellman drew his warehouse receipt covering the fuggles out of his billfold and handed it to Mr. Noakes.

Q. Did he say anything?

A. I don't recall that he said anything right at that time.

Q. Do you recall what Mr. Noakes did then? Did he write out a check?

A. Yes, he did. He wrote out a check and gave it to him, and also typed out a memorandum of the deal, covering the contract.

Q. Did you see him give Mr. Wellman that check and that memorandum? A. I did.

Q. Do you recall what, if anything, Mr. Wellman said? Did you see Mr. Wellman accept or take the check? A. Oh, yes, I did.

Q. What did Mr. Wellman do when he took the check and memorandum?

A. I don't recall what he did. There was activity around the office.

(Testimony of Gilbert Davis.)

Q. Did Mr. Wellman express the consent to the acceptance of that check?

A. He took it. He took the check in his hand.

Q. When Mr. Noakes told Mr. Wellman that he would not accept the cluster hops, did he say why they were not accepted? [322]

A. I don't recall that he said we cannot accept them for any certain reason, no. I was working at the adding machine, I think, and there was other work to be done. I don't recall what he said; I don't recall that he came right out and gave a reason for not taking them.

Q. Did you hear all the conversation at that time between Mr. Noakes and Mr. Wellman?

A. Well, I was present there in the room. I believe that covers pretty well what I heard.

Q. You think you heard all the conversation that the two of them had? A. I believe so.

Q. Do you recall whether or not Mr. Wellman asked why the hops were not accepted?

A. I don't think he said that.

Q. Do you recall definitely whether or not he asked that?

A. I would say that he did not.

Q. Have you ever been authorized to accept Mr. Wellman's lot of 1947 cluster hops?

A. Oh, no.

Q. Have you ever been authorized to change any provision of the written contract between Mr. Wellman and John I. Haas, Inc.? A. No, sir.

Q. Have you ever been authorized to waive—

(Testimony of Gilbert Davis.)

A. No. [323]

Q. —any provision of the written contract?

A. No.

Mr. Kerr: That is all. Thank you.

Cross-Examination

By Mr. Dougherty:

Q. In what condition was Mr. Wellman's yard in 1947? A. As to what respect?

Q. Cultivation and so forth?

A. I would say it was in excellent condition for cultivating and stringing.

Q. As to the mildew damage in his yard in 1947, would you say it was about average of the yards that were hit?

A. I saw yards that were hit harder than that; that is, more damaged, and I saw yards that were less damaged, considerably less.

Q. Did you make the advances to Mr. Wellman under his contract after the mildew had hit his yard?

A. I believe that the advances that I made were picking advances for the fuggles, made before the 20th. He called for advances on the 20th, and I believe it was a few days before the 20th it was made.

Q. At that time did you look at his yard?

A. I did.

Q. Were his hops in the kiln at that time? [324]

A. I believe they were picking at that time, the fuggles hops, yes.

(Testimony of Gilbert Davis.)

Q. Do I understand you took your first sample of late clusters the 13th of September?

A. I believe that was the date.

Q. Didn't Mr. Wellman finish picking the late clusters about Saturday, the 13th of September?

A. I couldn't say when Mr. Wellman finished picking.

Q. This conversation you have related about 64 bales, as a matter of fact if there had been 64 bales there at that time you would have known it, wouldn't you?

A. There was either three or four bales that were baled out and I took a sample of one of them, as I recall, and that was to represent 64 bales. As soon as I drew the sample, I asked how many there would be like that and Mr. Wellman told me that there would be about 64 bales.

Q. When does John I. Haas, Inc., ordinarily put this Haas brand or seal on the head?

A. As we ship them out.

Q. As they are shipped out?

A. Yes, J.I.H., the initials.

Q. Yes. If you are selling them to Steiner, for example, would you put the Haas brand on these hops?

A. I don't recall that we ever sold hops to Steiner.

Q. These Wellman 1947 fuggles went to Steiner?

A. Yes, I understood they did. We did not sell them to him, though, but that was my understanding.

(Testimony of Gilbert Davis.)

Q. Were you with Mr. Noakes at the time the hops were inspected, samples numbered and weighed, on September 25, 1947?

A. Yes, I was there.

Q. Was that procedure in the usual manner?

A. I would say it was in the usual manner.

Q. Did you observe the Government inspector taking his samples at that time? A. I did.

Q. Was that done in the ordinary manner?

A. Yes, I would say it was in the ordinary manner.

Q. With reference to the Wellman 1947 clusters, would you say that they had some mildew discoloration?

A. They had considerable mildew discoloration.

Q. Would you describe them as large, flaky hops of a greenish color?

A. Yes, they were a large hop.

Q. Would you describe them as a whole-berried hop? A. Yes, a whole-berried hop.

Q. Would you say they were well filled with lupulin? A. They were.

Q. Would you say they had quite a good flavor?

A. A good flavor.

Q. Would you say they were about the average of the late cluster [326] hops that you saw in 1947?

A. Again, I saw hops better and I saw hops considerably worse, both ways.

Q. Just to refresh your recollection, do you remember your deposition? A. Yes, I do.

(Testimony of Gilbert Davis.)

Q. Reading from Page 21: "Go ahead and tell us about the hops you took," and your answer, "I believe they were about average.

"Q. About average?

"A. For what I had seen."

Would you say that was correct?

A. It is possible to read ahead a little and see what that related to?

Q. Ahead or before? A. Before.

Q. "Q. So far as mildew was concerned, they were about average, is that correct?

"A. You mean for the amount of mildew that was in the hops?

"Q. Yes, for the hops which you inspected in the Willamette Valley in 1947.

"A. Well, the hops that we took, I wouldn't say that they were——

"Q. The question was the hops which you inspected. Go ahead and tell us about the hops you took.

"A. I believe they were about average. [327]

"Q. About average?

"A. For what I had seen."

Do you consider that Mr. Wellman's 1947 clusters were about average for the 1947 clusters that you saw?

A. Well, I saw hops that I thought that had, you might say, no mildew, and I saw hops that had a lot of mildew and Mr. Wellman's hops was in be-

(Testimony of Gilbert Davis.)

tween. I seen some that had more mildew than Mr. Wellman's. Does that answer your question?

Q. Was the statement that I read from the deposition correct at the time you made it?

A. I still don't get whether it was average on the vine or average in the bale. I am not quite clear there. That is why I asked you to go further back and read.

Q. What do you think? Were they average in the bale? A. Pardon?

Q. What do you now think? Were they about average when you saw them in the bale?

A. Well, I believe they were an average hop.

Q. You considered that they were well baled?

A. Oh, yes.

Q. This conversation that you have testified to between Mr. Wellman and Mr. Noakes several days before the 25th of September, what time of day was that?

A. I would say it was late in the afternoon, fairly late in the afternoon, maybe 4:30 or around that time. [328]

Q. Would you say it was in the evening, after supper?

A. Oh, no. We had not left the office to go home for supper.

Q. Was there any agreement reached between Mr. Noakes and Mr. Wellman at that time?

A. I thought there was, yes.

(Testimony of Gilbert Davis.)

Q. How did you consider that Mr. Wellman agreed to this? A. He agreed to this?

Q. Yes, the arrangement that you have testified about.

A. Oh, making an inspection of his hops? Well, I don't—we just don't go into a man's hops unless he agrees to let you go into them. He has to give you permission to make an inspection of his hops. They are his property.

Q. Didn't Mr. Wellman ask you that you inspect his hops so he could go hunting?

A. He did, yes.

Q. Is there any additional permission required if he asks you to inspect them?

A. No. That is what I thought you had reference to.

Q. Then what did Mr. Noakes say after Mr. Wellman asked him to go through his hops?

A. He said, "I think we can make arrangements to do it, to do this work."

Q. Did Mr. Noakes at that time say inspecting and sampling and marking and weighing the hops would not constitute an acceptance?

A. He did. I don't know whether he used those exact words, but [329] he said, "We will have to send these samples, these tenth-bale samples, back to Washington for their approval."

Q. What does that mean, he would have to send the tenth-bale samples back to Washington?

(Testimony of Gilbert Davis.)

A. "We will have to send them back there for their acceptance."

Q. Is that what he said? Did he tell Mr. Wellman that? A. He did.

Q. As a matter of fact, that practice of taking tenth-bale samples and sending them East is new?

A. We always send them to Hillsboro and they, in turn, I understand, send them East.

Q. Hasn't that always been the practice since you have been employed by A. J. Ray & Son?

A. We always send our samples to Mr. Ray and I understand that he sends them all back East.

Q. Do you also understand that John I. Haas, Inc., shows these tenth-bale samples in selling the hops?

A. That is my understanding; yes, sir.

Q. With reference to the same deposition, Mr. Davis, with reference to this conversation about inspecting the hops, at that time you were asked this question:

Q. Was anyone else present at that time?

A. Mr. Noakes and Mr. Wellman.

"Q. And yourself?

"A. And myself. We came in on an evening to work. I recall [330] that was the time that it happened."

Mr. Kerr: What page?

Mr. Dougherty: Page 30.

A. Can I explain that?

Q. Please do.

(Testimony of Gilbert Davis.)

A. After we did our day's work, we came to the office to write up our figures, set down our figures and what we have done. We always make it a point to come to the office and from there we go home. Does that clear that up?

Q. And by "evening" there you mean afternoon?

A. It must have been either from 4:30 on—that is an estimate. I don't know the exact time. That is an estimate.

Mr. Kerr: Will Counsel indicate what day we are talking about now, in fairness to the witness?

Mr. Dougherty: The witness, I think, understands.

A. Prior to—I said it was prior to the 25th of September.

Q. Then, continuing with the deposition:

"Q. What was it exactly Mr. Noakes said to Mr. Wellman at that time?"

That was the question that was asked, and you replied:

"A. That it would be possible to make the inspection, and the inspection would be to get our samples out of them and submit them to John I. Haas."

A. Yes.

Q. Is that substantially correct? Is that what Mr. Noakes told [331] Mr. Wellman?

A. I believe it was.

Q. Did Mr. Noakes tell Mr. Wellman it would be possible to make the inspection?

(Testimony of Gilbert Davis.)

A. That he thought it would be possible to arrange the work, our work, and you have to make arrangements with the warehouse, and I think Mr. Noakes told him that he thought that would be possible, that it would be possible to make those arrangements.

Q. And that you draw your tenth-bale samples?

A. That is right.

Q. And that you send them to John I. Haas, Inc., as usual? A. That is right.

Q. Then, continuing:

“Q. For inspection by——

“A. Yes, for his inspection.

“Q. Did Mr. Noakes say that they were to be submitted to the Haas corporation back East?

“A. Yes.

“Q. Then what did Mr. Wellman say?

“A. That he wanted them inspected.”

A. Yes.

Q. Is that what Mr. Wellman said, that he wanted his hops inspected? A. That is right.

Q. “Q. You said that there was an agreement between them at [332] that time. What was that agreement? How was it expressed?

“A. I don’t recall saying agreement, but, as I recall, Mr. Wellman wanted—he asked to have his hops inspected and Mr. Noakes said that he would arrange to go through them and make his inspection.” A. Yes.

Q. Is that what occurred?

(Testimony of Gilbert Davis.)

A. I believe it is.

Mr. Dougherty: Thank you.

Redirect Examination

By Mr. Kerr:

Q. With reference to the 64 bales, you say Mr. Wellman told you he would have 64 bales, when you took your first type sample. Were those 64 bales then baled or were they in the bin?

A. I think there were three or four—I don't know exactly—that was baled, sitting there in the storeroom. The rest of them, I understood, was up in the storeroom, loose.

Q. Was that first type sample you took at that time like your subsequent samples?

A. There was no comparison.

Q. In what way?

A. The first ones showed, if any, very little mildew.

Q. What about the later samples that you saw?

A. There was considerable mildew. [333]

Q. In the later samples that you saw did you notice any nubbins or small, immature hops?

A. Oh, yes. There were a lot of nubbins that they shook off the vines into the baskets. It was quite noticeable. That was in the samples.

Q. Would you call these nubbins whole-berried hops? A. Oh, no, not whole-berried.

Q. When you refer to whole-berried hops, in answer to the question by Mr. Dougherty, do you mean to include those mildewed hops or nubbins?

(Testimony of Gilbert Davis.)

A. I don't believe I told Mr. Dougherty there were nubbins in there, but there are certainly nubbins in the samples. They will show that if you inspect them.

Q. The samples of the Wellman clusters that you saw, were they cleanly picked?

A. I would say they were not cleanly picked.

Q. Did they show the presence of a substantial quantity of leaves and stems? A. They did.

Q. Was mildew damage to the hops visible when you looked at the later samples? A. Yes.

Q. Was that damage easily seen or was it something you had to search for?

A. No, mildew damage stands out. You can certainly tell it from [334] a hop that does not have mildew damage.

Q. Did that mildew damage stand out on the samples that you saw?

A. It did, quite plainly.

Q. On September 13th, when you drew the first type sample of Mr. Wellman's clusters, had you seen many hop samples of the 1947 crop?

A. Not a great many; some, yes, but not a great many; principally fuggles.

Q. Do you have any means of knowing or determining what the average Oregon 1947 lot of hops looked like?

A. Only samples I got to see are those that we drew.

Q. With reference again to the conversation between Mr. Noakes and Mr. Wellman concerning the

(Testimony of Gilbert Davis.)

weighing of Mr. Wellman's cluster hops, sometime before September 25th, do you now recall any statement by Mr. Noakes at that time to Mr. Wellman that the samples, the tenth-bale samples, would have to be sent back to John I. Haas, Inc., in Washington, D. C., for decision there as to whether or not they would be accepted?

A. Yes. Mr. Noakes said, "We will have to send the samples in, the tenth-bale samples. We will have to make our inspection and send these tenth-bale samples in to Mr. Ray and then on to John I. Haas, Inc., in Washington."

Q. Did he say he had to send them in to the Washington office?

A. I don't know whether he came right out and said the Washington [335] office. Most of the conversations were carried on while I was probably working at something else there, but I heard him say, "We will have to send these samples in."

Q. And that was prior to the 25th of September, is that right? A. That is right.

Q. Did you also hear such a conversation after the hops were weighed? A. I did.

Q. What was it that Mr. Noakes said at that time to Mr. Wellman about sending samples in to the Haas corporation?

A. "We will have to send these samples in for their inspection."

Mr. Kerr: That is all.

The Court: Step down.

(Witness excused.)

(Thereupon a recess was taken until 1:30 o'clock P.M. of the same day.) [336]

Court reconvened at 1:30 o'clock p.m., February 2, 1949.

RALPH E. WILLIAMS

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. State your name, please.

A. Ralph E. Williams, Jr.

Q. Where do you reside? A. Portland.

Q. What is your business?

A. Hop dealer.

Q. Under what name?

A. Williams & Hart.

Q. Where is the office of your firm located?

A. Here in Portland.

Q. You have testified in the previous cases here in court? A. Yes.

Q. Will you state whether or not 11-per cent leaf-and-stem content is cleanly picked, as that term is commonly used in the hop trade?

A. It is not. [337]

Q. Did your firm, Williams & Hart, buy at least some of the late cluster hops Otto Wellman produced in 1947? A. Yes.

Q. How were those purchased by your firm, on sample or otherwise? A. On sample.

(Testimony of Ralph E. Williams.)

Q. Strictly on sample? A. Yes.

Q. You appear here under subpoena, do you?

A. Yes.

Mr. Kerr: That is all.

Cross-Examination

By Mr. Dougherty:

Q. You bought 386 bales of late cluster hops in the first part of May, 1948, is that correct?

A. I don't remember the exact date, but approximately. It was in the spring.

Q. Did you pay 31 cents a pound for them?

A. As I recall, that was the price. I do not have a direct recollection of the price.

Q. From your recollection of the transaction, Mr. Williams, would you say that was the growers' market price for that type of hops at that time?

A. Yes, I would say so, by virtue of the fact we were in a [338] fairly limited market, and that in a fairly market, such as we had in the spring of 1948, each transaction in and of itself more or less created a market.

Q. From your knowledge of the hop business, Mr. Williams, would you say that the price which you paid Mr. Wellman for 386 bales late cluster hops was a fair price?

A. Yes, I would say so.

Mr. Dougherty: Thank you.

Redirect Examination

By Mr. Kerr:

Q. If you had been able to find prime-quality

(Testimony of Ralph E. Williams.)

hops at that time, would you have paid the grower that price for them?

A. Providing I could have found an outlet; in other words, providing I could have found a consumer who would be willing to pay the price that prime hops were quoted at.

Q. Do you recall whether or not there were any prime-quality 1947 hops available at that time?

A. My recollection is that if there were, they were very limited and, you might say, strongly held. I don't recall any transaction that took place in prime hops between a grower and a dealer.

Mr. Kerr: Thank you.

(Witness excused.) [339]

HOWARD EISMANN

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. State your name, please.

A. Howard Eismann.

Q. Where do you live? A. Salem, Oregon.

Q. What is your business?

A. I am in the hop business.

Q. Are you connected with S. S. Steiner, Inc.?

(Testimony of Howard Eismann.)

A. I have charge of their business in Oregon.

Q. You have testified in a previous case in this series of cases? A. I have.

Q. Before this Court? A. That is right.

Q. Have you examined samples of the Otto Wellman late clusters, 1947 crop of hops, which are in evidence here as Exhibit No. 11? A. I have.

Q. Will you state the nature and type of light under which you examined them, daylight or artificial light or what?

A. I examined them in daylight by that window.

Q. What is your opinion as to whether or not the hops of which [340] Exhibit No. 11 are samples were prime-quality hops when the samples were drawn from the bales?

A. They were not prime.

Q. Why not?

A. Because they were dirty picked and contained a great quantity of downy mildew, downy-mildew damage.

Q. How is that downy-mildew damage apparent from the samples?

A. In these particular hops it is primarily the so-called nubbins and then a decided damage to many of the burrs, and there are a few burrs which did not properly develop on account of downy mildew—partially developed but not completely.

Q. Is that quantity of nubbins you found a substantial quantity in each sample?

A. Yes, it is substantial.

(Testimony of Howard Eismann.)

Q. Is that mildew damage readily apparent from an examination of these samples.

A. Yes.

Q. Is there any question in your mind as to the presence of mildew damage in those samples?

A. None whatsoever, in the samples I looked at here.

Q. Were those hops well and cleanly picked, would you say? A. No.

Q. Is the term "cleanly picked" generally used in the hop trade as to hops which contain 11 per cent leaves and stems? Is that generally considered in the hop trade to be a cleanly picked [341] hop?

A. No.

Q. Were they, in 1947, considered to be a cleanly picked hop? A. No.

Q. State whether or not the Wellman hops which you have seen—samples of which you have seen, the samples referred to, are of even color?

A. They are not of good and even color.

Q. Are they of even color? A. No.

Q. Why not?

A. Because of the fact that many of the burrs have been damaged by downy mildew which gives them a brownish-red appearance.

Q. Are they free from damage by disease?

A. No.

Q. Would you say, basing your judgment on the samples in evidence here, and which you have examined, that at the time those samples were drawn

(Testimony of Howard Eismann.)

from the bales the hops were in good, merchantable order and condition?

A. I didn't understand that.

Q. Judging from the samples which you have seen——

A. Yes.

Q. ——and which are in evidence as Exhibit 11——

A. Yes.

Q. ——what is your opinion as to whether or not the hops from [342] which those samples were drawn were of good, merchantable order and condition?

A. They would not be good, merchantable hops. They would be merchantable, I would say, yes, but not good, merchantable hops, and that term usually applies to the appearance of the bale.

Q. In your opinion, is there any possible doubt as to whether or not the hops, the samples of which you say you have examined, were prime-quality hops?

A. There is no doubt in my mind.

Q. Did you have a conversation with Mr. Clifford Noakes of A. J. Ray & Son in September, 1947, relative to an arrangement for the inspection and weighing of the Otto Wellman 1947 cluster hops?

A. I did.

Q. When was that, if you remember?

A. It was on or about—it was one or two or three days prior to September 25, 1947.

Q. What was the occasion for your having that conversation with Mr. Noakes?

(Testimony of Howard Eismann.)

A. Well, the occasion was that Mr. Wellman had asked us to do something about his hops and, before doing so, I wanted to check with Mr. Noakes.

Q. By "us" you mean who? You say Mr. Wellman "asked us."

A. S. S. Steiner, Inc.

Q. Where is the office of that firm? [343]

A. 308 Oregon Building in Salem.

Q. Did Mr. Wellman come to your office, or did he telephone?

A. He came in.

Q. What was the conversation that you had with Mr. Wellman at that time?

A. Well, of course, he had been asking us, as I said, to take delivery of his hops or do something about them, and on that day I had instructions from our New York office as to the handling of this particular deal.

We had submitted two samples—two or more samples, I should say. One was drawn on September 11th, according to our records in the office, and then again on September 16th we got some further samples of the late clusters.

Q. These were samples of Mr. Wellman's late clusters, 1947?

A. Yes. The New York office had been in receipt of these samples and had given me instructions to the effect that I could take delivery of the fuggles and, as far as the late clusters were concerned, the samples appeared to be mixed; there was one that appeared to be fairly good and the others were poor.

(Testimony of Howard Eismann.)

My instructions were, due to that difference the hops would have to be inspected and leaf-and-stem analysis determined before I could accept any late clusters.

I explained this to Mr. Wellman and he said to me, "Well, you know, I want to leave and I want to get this thing cleaned up," and I told him that was the only circumstances under [344] which we could work the hops, that is, subject to the firm's later acceptance after they had viewed the samples of the late clusters.

His reply to me was, "Okeh. Go ahead," or words to that effect.

Q. Did you at that time tell Mr. Wellman it would be necessary for you to send tenth-bale samples of his late clusters in to New York, the New York office of S. S. Steiner, Inc.?

A. I don't recall that I used the words "tenth-bale samples." I think I used "inspection samples."

Q. Did you tell him it would be necessary to send inspection samples in to New York for S. S. Steiner, Inc.?

A. On the late clusters, definitely. We had permission to take the fuggles on sample, you might say, and they were pretty good hops.

Q. Did you have an oral agreement at that time with Mr. Wellman concerning such inspection and weighing not being an acceptance of the late clusters by S. S. Steiner, Inc.?

(Testimony of Howard Eismann.)

A. That was the substance of our understanding, that we make our inspection—we did not mark them. We marked the fuggles later on, but we did not mark the late clusters. It was the substance of our understanding that our inspection and weighing of the hops would not constitute an acceptance at that time, until we received approval from Steiner of our inspection samples.

Q. Did you at that time have a definite understanding with Mr. Wellman [345] to that effect?

A. I did.

Q. Did Mr. Noakes at that time, or about that time, indicate to you whether or not he had a similar understanding with Mr. Wellman?

A. I called Mr. Noakes, I think before I told Mr. Wellman definitely that we would go ahead, to see whether or not Mr. Noakes had any kind of an understanding about it.

Q. What did Mr. Noakes tell you at that time?

A. He told me, "I have the same understanding with Otto," and I thought it was all right to go ahead.

Q. By the "same understanding" what, specifically, do you refer to?

A. The understanding that the hops were not being accepted; in other words, that the inspection, weighing and so forth did not constitute an acceptance.

Q. At that time did Mr. Wellman tell you why he was desirous of having the hops inspected at that time?

(Testimony of Howard Eismann.)

A. Oh, he mentioned he was going to go hunting. He was in a hurry, I know.

Q. Will you state why you considered it advisable to have an understanding with the grower, with Mr. Wellman, that the inspection and weighing of his hops would not constitute an acceptance of the hops?

A. I had definite instructions from our office in New York to [346] proceed in that way.

Q. Do you know why such instructions were issued to you?

A. Well, in Mr. Wellman's case, as I said, the samples were mixed. There was one sample that appeared to be very good and the others were bad. There was no way to determine how much good quality or how much poor quality there might be until we inspected the hops.

Q. Was there anything unusual about the 1947 situation with respect to the Oregon hops which caused this arrangement to be required by your principal, whereby inspection samples would be sent back to their main office for acceptance or rejection there?

A. Well, with our company it is not a new innovation, exactly. In a case such as this, where the lot, based on the type sample, appeared to be very good, we have done that before.

Q. Did Mr. Wellman later deny he had made any such agreement or had any such understanding with you?

(Testimony of Howard Eismann.)

A. Well, he didn't exactly deny it, but he never would confirm it, either.

Q. Just what do you mean by that, Mr. Eismann, that he did not exactly deny it but would not confirm it?

A. Well, I don't think I have ever asked Mr. Wellman point-blank, face to face, about it but, yes, he denied it, as far as that is concerned.

Q. Will you state the circumstances under which he denied it? [347]

A. Just refused to recognize it.

Q. Did S. S. Steiner, Inc., accept Mr. Wellman's 1947 clusters or your portion of the clusters covered by his contract?

A. We never did accept the clusters, or any part of them.

Q. Why not?

A. They were definitely of poor quality and could not be used by our organization at any price.

Q. Did the contract you had with Mr. Wellman covering one-half of his 1947 production of late cluster hops call for a hop of good quality? Did it call for a hop of good color?

A. Yes, it did.

Q. Well and cleanly picked?

A. Yes.

Q. Did it call for, in general, a prime-quality hop?

A. Yes, although it does not specify the word "prime."

Q. State whether or not the rejection by Steiner, Inc., of the Wellman 1947 late cluster hops was on

(Testimony of Howard Eismann.)

the ground that the hops did not come up to the contract specifications?

A. That is the fact, and we so advised Mr. Wellman, I think it would be the latter part of October.

Q. Reference has been made in the testimony in this case, introduced by the plaintiff, to a compromise settlement of S. S. Steiner, Inc., with Mr. Wellman concerning those particular hops. Was such a settlement made with Mr. Wellman?

A. It was. [348]

Q. Will you state the circumstances under which that settlement was made?

A. Of course, after Mr. Wellman brought suit against us, we could not use the hops and finally made a cash settlement with Mr. Wellman in Mr. Shields' office, you might say, for the nuisance value. We never admitted any liability on the deal, but we do not want to go to court for various reasons.

Q. Did Steiner, Inc., ever acknowledge that by weighing the late cluster hops it had accepted the hops? A. No.

Q. Did anyone representing you or S. S. Steiner, Inc., in connection with the weighing of the Wellman cluster hops in 1947 execute any document which indicated acceptance or receipt of these particular hops?

A. That is one of the main reasons why we made the settlement for the nuisance value.

Q. Will you state the circumstances of that?

(Testimony of Howard Eismann.)

A. There were two things, Mr. Kerr. Do you want both of them?

Q. If you please; yes.

A. To begin with, Mr. Wellman contacted the man who buys hops for us on commission. He is not a steady employee, and this man allowed Mr. Wellman to make his price selection, and this agreement was drawn up on a purchase sales slip, which is the wrong form for the purpose. We had this to contend with, and we were afraid it would be construed that the man had full authority to act for us, in case we had to go to court. [349]

Q. Was that agreement which you say was signed by the broker signed by him after the hops were in the bale?

A. There were just a few hops baled at that time.

Q. What was the second consideration mentioned?

A. The second consideration was the form of weight sheet which we had used which states on the top of it "Hops Received," and of which Mr. Wellman had a copy.

Q. Was that weight sheet which you say had the words "Hops Received" intentionally executed as an acknowledgmet of the actual acceptance of those hops? A. No, it was not, definitely.

Mr. Dougherty: The document is here, your Honor, and speaks for itself.

The Court: He may answer.

(Testimony of Howard Eismann.)

Mr. Kerr: The document is not here.

The Court: He may answer. Hurry along.

A. It was not meant as an acceptance of the hops by us.

Mr. Kester: We would like to have it marked, if the Court please.

Mr. Kerr: I would like to see it and show it to this witness. This is the first time I have seen it.

Mr. Kester: The first time it has come up in the case.

Q. (By Mr. Kerr): Is Steiner, Inc., a competitor of John I. Haas, Inc.?

A. I think that John I. Haas, Inc., and S. S. Steiner are the [350] two largest hop dealers and naturally there is a great deal of competition between them.

Q. Can you explain why it happened that half of the Wellman late cluster crop was contracted to one firm and half to the other?

A. We were both trying our best to buy the crop; at the time Mr. Wellman finally decided to split it.

(Group of Weight Slips, S. S. Steiner, Inc., marked Plaintiff's Exhibit No. 16.)

Mr. Kerr: Will you hand to the witness what has been marked as Exhibit 16. Will you state what that is Mr. Eismann.

A. That is our weight sheet that was used.

Q. Is that the weight sheet that was executed in connection with the Wellman 1947 cluster hops?

(Testimony of Howard Eismann.)

A. That is correct.

Q. That was executed on behalf of S. S. Steiner, Inc., is that correct? A. That is right.

Q. Is that the weight sheet that you referred to as having the words "Hops Received" on the top of it? A. Right.

Q. You appear here under subpoena, do you not? A. I do.

Q. Is that weight sheet, Exhibit 16, initialed by anyone?

A. Initialed by Mr. Kerr who was employed by us. [351]

Q. That Kerr was not myself?

A. No, Mr. Ray Kerr.

Q. Did he have authority to initial that?

A. He did, but there was no authority given at this time to give Mr. Wellman copies of these weight sheets. To this date I don't know how he got them. Mr. Kerr does not remember giving them to him, nor by any of my other men, as far as that is concerned.

Mr. Kerr: That is all.

Cross-Examination

By Mr. Dougherty:

Q. Does the Steiner corporation have any litigation pending at present involving similar questions, Mr. Eismann? A. No question like this.

Q. Is the Steiner corporation involved in hop litigation at present, in Oregon?

(Testimony of Howard Eismann.)

A. We have two suits pending in Polk County which are for the return of advances made.

Q. 1947 advances? A. That is right.

Q. You are suing to obtain back the advances that were made, is that correct?

A. That is correct.

Q. You spoke about the nuisance value of Mr. Wellman's action [352] against S. S. Steiner. What do you mean by the term "nuisance value"?

A. I think that is a term that covers anything that is a nuisance.

Q. Was there a substantial settlement made in that case? A. Quite substantial, yes.

Q. Quite substantial? A. Yes.

Q. In addition to the cash which Steiner paid Mr. Wellman, Mr. Wellman was permitted to sell the hops in addition, is that correct?

A. Well, we would not take the hops for any money ourselves.

Q. Steiner did not take the hops and Mr. Wellman was permitted to sell them, is that correct?

A. Naturally.

Q. The sales slip that you mentioned that Steiner's field men signed for Mr. Wellman, is that similar to the sales slip involved in the Smith and Geschwill cases here?

A. I didn't see that sales slip. It is the ordinary standard form that the men use in the field for buying spot hops.

Q. Would it be correct to say that is a slip that is ordinarily used in making spot purchases?

(Testimony of Howard Eismann.)

A. That is right. That is what we consider. That is one of the reasons we decided not to stand on our rights.

Q. Mr. Eismann, you said you could now, from an examination made at this time, determine what these hops were like at the time [353] the samples were drawn?

A. You can, on some definite factors.

Q. Could you tell now what the flavor was when they were fresh hops? A. No.

Q. The mildew markings do not improve with the course of time, is that correct?

A. Well, I think the downy-mildew markings would stay about the same.

Q. But the hops otherwise would deteriorate, is that correct?

A. That is right. Certain features of the quality would deteriorate.

Q. When Mr. Wellman asked you to take in his hops, and you called up Mr. Noakes on the telephone, was Mr. Wellman in your office at that time?

A. I don't recall now whether he was or not. I think probably he was, at one of the times anyway.

Q. Did you have several conversations with Mr. Noakes?

A. No, there was only one we had, but what I mean is, I made a couple of calls, one to Mt. Angel

(Testimony of Howard Eismann.)

to try to arrange warehouse space and another call to Mr. Noakes, but I don't remember whether Mr. Wellman was there when I made both calls or not. I remember he was there one time.

Q. Did you first call Mr. Noakes to see if that would be agreeable, if that date was agreeable with him? [354]

A. I do not recall, now, which call I made first. I remember both of them, but I do not remember which one was first.

Q. Did you at that time tell Mr. Wellman that you would inspect his hops but that, because of the sliding scale, the price would depend upon the official leaf-and-stem analysis?

A. I definitely did not.

Q. What was your reference to the leaf-and-stem analysis, then?

A. Just simply a matter as to whether or not hops were clean enough that they could be accepted by us under contract delivery.

Q. Did the Steiner corporation recognize this sliding scale in 1947?

A. We did, uniformly throughout.

Q. Did Steiner take delivery of the fuggles?

A. We did.

Q. Did Steiner, as a matter of fact, obtain all Mr. Wellman's fuggles?

A. Eventually, yes. However, I think that deal has been explained here. It was not any deal we

(Testimony of Howard Eismann.)

made with Mr. Wellman or Ray & Son or John I. Haas, Inc.

Q. Is it your practice not to permit growers to see the weight slips on their hops?

A. Ordinarily it is our practice not to give weight slips; I mean, this particular form which says "Hops Received" unless we are actually receiving the hops.

Q. That "Hops Received" slip was written up when Mr. Wellman's [355] clusters were inspected?

A. It was.

Q. On September 25th? A. Right.

Q. Do those slips show as the date received September 25, 1947? A. They do.

Q. Do those slips show that Steiner's half of Wellman's clusters were received by Mr. Kerr?

A. They do.

Q. Are the slips signed by Mr. Kerr?

A. Yes, just the word "Kerr."

Q. Do some of them say "Ray Kerr"?

A. I don't know. I was just looking at one here. Yes, some of them say "Ray Kerr."

Q. Is Mr. Kerr an inspector for Steiner?

A. He is.

Mr. Dougherty: Thank you, Mr. Eismann.

Mr. Kerr: That is all.

(Witness excused.) [356]

RONALD TROXEL

was thereupon produced as a witness on behalf of Defendant, and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. Please state your name.

A. Ronald Troxel.

Q. Where do you live?

A. Salem, Oregon.

Q. What is your occupation?

A. Hop buyer.

Q. And were you a hop buyer in 1947?

A. Yes.

Q. Employed by A. J. Ray & Son in 1947?

A. Yes.

Q. Did you assist in weighing and inspecting and sampling of Mr. Wellman's late cluster hops in 1947, in behalf of A. J. Ray & Son?

A. I did.

Q. Who else was there at that time?

A. Mr. Noakes and Mr. Davis and Mr. Wellman.

Q. Do you recall when it was?

A. September 25th.

Q. At that time did you hear any conversation between Mr. Noakes and Mr. Wellman relative to the tenth-bale samples being sent [357] back to Washington, D. C.?

A. After we had finished, yes.

(Testimony of Ronald Troxel.)

Q. What was that conversation?

A. Well, Mr. Noakes refreshed Mr. Wellman's memory of the fact that the tenth-bale samples had to go East for Washington's approval and acceptance.

Q. Did Mr. Wellman say anything you heard at that time?

A. He remarked that that was satisfactory with him.

Q. Did you hear Mr. Noakes tell Mr. Wellman at that time he could not accept the hops, that the samples had to go back to Washington?

A. That is right.

Q. Is there anything else in that conversation that you now recall?

A. That was about all, because we were just ready to go home.

Q. When was that with relation to the taking of the tenth-bale samples?

A. That was after they were weighed and everything was finished.

Q. That was where?

A. In the Mt. Angel warehouse.

Q. Is that known as Schwab's warehouse?

A. Yes.

Mr. Kerr: That is all. [358]

Cross-Examination

By Mr. Dougherty:

Q. Mr. Troxel, you say that this conversation was after the hops had been weighed in?

(Testimony of Ronald Troxel.)

A. That is the first conversation of the kind I heard, yes.

Q. You were assisting Mr. Noakes in making the inspection? A. I was assisting him.

Q. Was that inspection made in the normal manner?

A. Under those conditions it was not; the inspection at least was normal but the prevailing conditions afterwards were not.

Q. Did you observe the Government inspector taking samples at that time? A. Yes.

Q. Was that done in the customary manner?

A. In the regular manner, yes.

Q. Before this conversation that you have testified about, were the bales marked on the head?

A. Just the warehouse mark and the Government stamp.

Q. Weren't they numbered on the head?

A. We numbered them on the head when we inspected them.

Q. This conversation you testified about was after they had been weighed in?

A. That was the first I had heard of it, yes.

Q. Mr. Noakes said the samples would have to be sent East, did he? [359] A. Yes.

Q. Is that where you ordinarily send these samples?

A. We send them to Hillsboro and they transfer them from there East with a bunch from Oregon.

(Testimony of Ronald Troxel.)

Q. Do you always send in these so-called inspection samples to Hillsboro? A. Always.

Q. So, sending them to Hillsboro was by no means uncommon, is that correct?

A. That is right.

Mr. Dougherty: Thank you.

Redirect Examination

By Mr. Kerr:

Q. Just a moment, please. Did you not at that time—that is, at the time you heard this conversation between Mr. Noakes and Mr. Wellman at the warehouse in Mt. Angel—did you not know at that time that A. J. Ray & Son could not then and there accept those hops? A. I did.

Q. You knew that by reason of what?

A. On our way over that morning Mr. Noakes told me that was the way they should be taken in.

Q. What did Mr. Noakes tell you in particular at that time?

A. He said he had instructions that we could not go ahead with [360] the crop, other than just inspecting them and weighing them and sampling them and numbering the bales, that we then had to submit inspection samples for approval of Washington, D. C.

Mr. Kerr: That is all.

(Witness excused.)

H. F. FRANKLIN

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. Will you state your name, please.

A. H. F. Franklin.

Q. Where do you live?

A. Springfield, Oregon.

Q. You have testified in another one of the series of cases upon trial before this Court?

A. Yes.

Q. At that time you stated your qualifications as a hop inspector? A. Yes, sir.

Q. Have you examined the samples of the Otto Wellman late cluster 1947 crop of hops which are marked Exhibit No. 11 in this case?

A. Yes, sir; I did. [361]

The Court: Is this your last witness?

Mr. Kerr: Our last witness, except for Mr. Haas who is coming from the East.

The Court: You may answer.

(Question read.)

Q. (By Mr. Kerr): State whether or not in your opinion those are samples of prime-quality hops? A. They are not.

Q. Why not?

A. They have considerable mildew damage and they are dirty picked.

(Testimony of H. F. Franklin.)

Q. How does the mildew damage show up?

A. There are some of those so-called nubbins that you refer to here in this other case, the Geschwill case. About half the cones show mildew damage, and then there is discoloration from mildew throughout the samples.

Q. Is that damage by mildew readily apparent from an examination of a sample?

A. Yes, it is.

Q. Is there any question in your mind about the presence of mildew damage? A. No.

Q. State whether or not the samples show freedom from damage by disease?

A. No, they do not. They show mildew damage.

Q. Were those hops well and cleanly picked, in your estimation, as that term is commonly used in the industry? A. No, they are not.

Q. Are they of even color? A. No.

Q. By reason of what?

A. Of mildew discoloration.

Mr. Kerr: That is all.

Cross-Examination

By Mr. Dougherty:

Q. Do you have any personal knowledge of the 1947 hop crop in the Willamette Valley?

A. Just these three lots that I have examined in the courtroom is all.

Q. You have examined all these samples within the last few days?

(Testimony of H. F. Franklin.)

A. That is right, all of these.

Q. Do samples deteriorate over a period of a year and a half? A. Yes.

Q. Could you now say what the flavor of these hops was at the time they were fresh?

A. No, I couldn't.

Q. You have been here throughout these three cases, is that right? A. Yes, I have.

Mr. Dougherty: Thank you. [363]

Redirect Examination

By Mr. Kerr: .

Q. Are you now or have you ever been in the employ of John I. Haas, Inc.?

A. No, I have not.

Q. Have you ever been in the employ of A. J. Ray & Son? A. No.

Q. Have you ever been in the employ of Mr. Harold Ray? A. No, I have not.

Mr. Kerr: That is all.

(Witness excused.)

Mr. Kerr: That is all of the defendant's witnesses with the exception of Mr. Haas, who will arrive by plane late Friday night and be available for testimony on Saturday morning.

The Court: Any rebuttal?

Mr. Kester: Do you want us to put rebuttal on now before they close their case?

The Court: Yes. Proceed. [364]

Plaintiff's Rebuttal Testimony

O. L. WELLMAN

having been previously duly sworn, was recalled as a witness in his own behalf, in rebuttal, and was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. There has been some comment made about a lot of 64 bales or an estimate of 64 bales of a certain type. Will you explain what that situation was?

A. There was one little particular yard that we called the hill yard that were less affected by mildew than some of the others. It was the freest yard that I had and I thought maybe we could keep them separate from the rest of them. We found out later that we had to get considerable more pickers, and our baling crew at first just couldn't handle the hops as they were coming in and, therefore, we finally mixed them all with our late clusters.

Q. Did you at one time attempt to keep the hops from the hill yard separate from the others?

A. Yes, we attempted to, at the start, yes.

Q. At the time Mr. Davis took his samples that he mentioned in the kiln, were they at that time separate from the others?

A. Yes, they were at that time. That was early—I would say probably about the 2nd or 3rd of September.

(Testimony of O. L. Wellman.)

Q. Then, what was necessary to do with that particular lot? [365]

A. Well, they went in the storeroom and we finally—we had to put the other kilns on top of these.

Q. From that time on was it possible to keep these separate in the baling process?

A. It was impossible.

Q. At the time these hops were weighed in, both the fuggles and clusters, did any representative of John I. Haas, Inc., put any kind of branding mark on the fuggles, other than the number?

A. No, they were marked identical.

Q. Did they subsequently take and pay for the fuggles? A. Yes, they did.

Q. In prior years, in dealing with John I. Haas, Inc., on this same contract, had they customarily made a deduction in price for leaf-and-stem content when it was over 8 per cent?

A. Yes, I think they did in 1946—three-quarters of a cent per pound.

Q. Was that satisfactory, as far as you were concerned at that time? A. Yes, it was.

Q. There has been some testimony about why the full amount of the advances was not made at the time you were picking the clusters. Would you state what the fact is on that?

A. That was made at my request. Mr. Davis came out and offered the advances.

Q. About when was that? Tell us that, first. Was it during [366] the cluster picking?

(Testimony of O. L. Wellman.)

A. I think we just started on the clusters when he was there, and I told Mr. Davis that the crop was smaller than usual, than the average we had been growing, and that I had a matter of twenty or twenty-five thousand dollars in the bank at that time, and that I figured I did not need all the advances and asked him, if I did, whether it would be all right if I could come and get some more later on and he said, "You are perfectly free to call at any time you want additional advances."

Q. Was there anything said at that time about any picking advances because of the quality of your cluster crop, the quality of your cluster crop would be below the contract standard?

A. It was never mentioned.

Q. At that time was there mildew apparent in the yard? A. Yes, there was.

Q. Did you ever have any conversation with Mr. Noakes or anybody else representing John I. Haas, Inc., or A. J. Ray & Son—Did you ever have any conversation with any of them to the effect that the weigh-in of these hops and the inspection, taking of tenth-bale samples, would not be considered an acceptance, in accordance with the usual procedure?

A. No, it wasn't. The first I heard of it was in this court.

Q. About when was it that you left on the hunting trip that you mentioned here?

A. It was the 28th day of August. [367]

(Testimony of O. L. Wellman.)

Q. Of August?

A. Or of September. Could I look at these notes?

Q. Do you have a calendar?

A. Yes, I have a little calendar.

Q. All right. If that will be of any help, when did you first ask Mr. Noakes about taking in the clusters?

A. I asked him about taking in the clusters on September 11th, like in prior years. I said, "I would appreciate it very much, Mr. Noakes. You know, we always generally go on a hunting trip the 1st day of the season and I would appreciate it very much if we could finish this job and I could get this hop business off my mind so we can go on a real hunting trip," and Mr. Noakes told me he would be willing to do everything in his power to see that the job was done before we went hunting.

Q. You left on the 28th. About when did you come back from the hunting trip?

A. Left on the 28th, I think, and returned on Sunday, October 5th, in the evening at about 7:30 or 8:00 o'clock.

Q. After October 5th were you at home or around the vicinity at all times thereafter during that month?

A. In fact, on Monday evening our group that went hunting, we had a meeting at the locker plant at Mt. Angel where we divided up and cut up our venison, and it was on Tuesday morning or Wednes-

(Testimony of O. L. Wellman.)

day that I went to Mr. Noakes' office in Salem. I had promised Mr. Noakes if I was successful on my hunting trip I [368] would certainly bring him some venison, if we were lucky. I delivered this venison to Mr. Noakes' office on either Tuesday or Wednesday that week.

Q. That would be about what date? About the 8th?

A. The 7th or 8th of October.

Q. Was Mr. Noakes present then?

A. Yes, I delivered it to him personally.

Q. About the 7th or 8th of October?

A. The 7th or 8th of October.

Q. Was anything said at that time about the hop crop?

A. Yes. The leaf-and-stem content wasn't back at that time.

Q. And what was said about the leaf-and-stem analysis not being in?

A. He figured it should be through most any time.

Q. What was being held up awaiting the leaf-and-stem-content analysis?

A. The report from the inspection office in Salem.

Q. Did he indicate whether or not that was holding up the closing of the deal?

A. Yes, that was what was holding it up.

Q. After that time, between the 7th and 8th of October and the 28th of October, when they made

(Testimony of O. L. Wellman.)

payment on the 28th, between those two dates did you see Mr. Noakes again at any time?

A. I am not sure, but I think I seen him the following week, also in Salem, or at Mt. Angel, the following week. [369]

Q. Did he say anything at that time about your crop?

A. No, he hadn't heard anything more.

Q. On October 28th, when this payment was made, was anything said at that time about their refusing to take and pay for the clusters?

A. No, it wasn't mentioned on that date.

Q. Did you ask him at that time about it?

A. Yes, I did.

Q. What did you ask?

A. Before I took the check, I asked Mr. Noakes, I said, "Will this have any bearing on the settlement of the lates, paying for the lates?" And Mr. Noakes said, "Not whatsoever." He says, "In fact, I think it will help you," and I said, "I don't know—I don't want to take this check unless it is so understood." I said I would like to take this check down, before I cash it, and show it to Mr. Shields, which I did.

Q. What did he say then as to whether or not the taking of that check would or would not have any effect on the lates?

A. It was never mentioned. He didn't say that it would affect the lates by taking out all the advances out of the fuggles contract.

(Testimony of O. L. Wellman.)

Q. Did he at that time say anything about when they would or would not pay for the lates?

A. Well, he said, "The lates just haven't come through."

Q. There was testimony here that when you were talking to [370] Mr. Ray over in Hillsboro that you said Noakes had not led you to believe that the hops had been taken. Was there any such conversation; or what was the conversation, if any, on that point?

A. Of course, we had done a lot of visiting in Mr. Noakes' office and on that part it is kind of hard to remember, but to my knowledge at present I don't think it was mentioned.

Q. What is the fact as to whether or not Mr. Noakes did lead you to believe that the hops had been taken and would be paid for?

A. That is what I believed all the time, and he led me so to believe.

Q. There has been some statement about warehouse receipts. What is the practice in the hop trade; that is, what has been the usual practice with John I. Haas, Inc., as to when warehouse receipts are delivered to the buyer?

A. I think several times the sight draft calls for the warehouse receipt attached, and other times Mr. Noakes would call for the warehouse receipt when he wanted to pay me for some hops. He would tell me, "Now, bring the warehouse receipt along for such-and-such a lot of hops."

(Testimony of O. L. Wellman.)

Q. Has it ever been the practice to turn the warehouse receipt over until you have been actually paid for the hops?

A. I have never done it in all the years I have raised hops.

Q. Something was said about your having a fuggles warehouse [371] receipt with you when you came into Mr. Noakes' office on the 28th. Will you state what the situation was on that and how that happened?

A. The fuggles warehouse receipt was brought at the request of Mr. Noakes.

Q. When did he make that request and how?

A. Over the telephone, to our office.

Q. Do you recall whether he called you or whether you called him?

A. He said he had some money for me there and he would like to have me bring my warehouse receipt for the fuggles.

Q. Did you ask him at that time about the clusters? A. Over the telephone?

Q. Yes.

A. No, I didn't, because he didn't ask for the warehouse receipt on the lates at that time.

Q. What is the fact as to whether or not in your picking of the clusters you left any hops on the vines?

A. It would be safe to say I wasted more hops in 1947 than any year since I have grown hops—that is, as far as leaving them all through the yard.

(Testimony of O. L. Wellman.)

Q. How was that done? Was it by separate vines or by——

A. Separate vines and separate clusters and by lack of having the kind of pickers that we usually had.

Q. Did you make an honest attempt to pick only the better hops [372] out of the yard?

A. Well, just like I said before, we had four sections and I had four or five men that had charge of either one of these sections, men that had complete charge of the sections, and a general foreman for the yard, and they worked with all of the different sections and tried to do the best job that possibly could be obtained that year.

Q. How many pickers did you have to pick your yard, if you recall?

A. I think we had at one time around 400. We run through the yard that year, according to the compensation report, I think something like eleven or twelve hundred people through our yard, for the season of 1947.

Q. Eleven or twelve hundred people?

A. Eleven or twelve hundred different kinds of people.

Q. Did you have occasion to see the yard of Joe Serres that has been mentioned here?

A. Yes, I have.

Q. What is the fact as to the extent to which his yard was affected by mildew?

A. Joe Serres' place is a matter of about four

(Testimony of O. L. Wellman.)

miles from our farm, and Joe Serres and I have in times worked together in getting our jobs of work done at our yards, sending help back and forth, and at one time he helped me drain the entire yard. I think it was that spring or the year previous, either 1946 [373] or 1947, and we visited back and forth considerable and I went all through his yards several times, with Mr. Serres.

Q. What was the condition of mildew in his yard?

A. One yard was severely hit; in fact, it hit so hard he replanted his entire yard this year.

Q. Was the mildew condition in his yard better or worse than in yours?

A. It was like my worst yard that I had in the bottom.

Q. Did A. J. Ray & Son and John I. Haas, Inc., or any of their representatives at all times have access to all of your hops in the warehouse, to make as many inspections or take as many samples as they might want?

The Court: That has been covered many times.

A. Yes.

Q. (By Mr. Kester): Did you have any concern about what they did and what samples they took?

The Court: That has been covered.

A. No, had no concern at all.

Q. (By Mr. Kester): Did they, or any of them, at any time ever make any statement as to what they intended to do with the samples?

(Testimony of O. L. Wellman.)

A. You mean before——

Q. When was the first time anything was ever said about what they were intending to do with the samples?

A. I think it was sometime after I came back from hunting, when [374] I asked Mr. Noakes whether he had any information. He said, "Well, Otto, things have changed some since you went hunting. They have taken all the dealings out of our hands and before we can make any acceptance from now on it has got to come from our Eastern office." That was after I returned from my hunting trip.

Q. You said there had been a change. What had been their practice in the past?

A. I always dealt with Mr. Noakes right there at the Salem office.

Q. To your knowledge, has he always had authority to act on his own judgment?

A. I never dealt with anybody but Mr. Noakes and Mr. Davis.

Mr. Kester: I think that is all.

Cross-Examination

By Mr. Kerr:

Q. I think you stated at one time you had what you estimated to be about 64 bales of cluster hops which you had harvested from part of your yard which were comparatively free of mildew, is that right? What was the yard which you referred to?

A. It was what we call the hill yard.

(Testimony of O. L. Wellman.)

Q. You got about 64 bales of good hops off that yard, is that right?

A. I think—I couldn't say because we didn't bale them; couldn't say; that was just an estimate. We didn't have them [375] baled.

Q. How did these hops compare with the rest or with the others you harvested from the rest of the yard? Were they much better?

A. The yard was free all the way through, pretty well.

Q. Did you give any consideration, Mr. Wellman, to stopping your harvest when you got through harvesting the hill yard so that all your hops in these 64 bales would be free of mildew? Did you give any consideration to stopping?

A. Mr. Noakes and Gilbert Davis were down in the yard below the hop house; in fact, we walked all through; Mr. Davis went all through the yard on separate occasions when I wasn't with him. Mr. Noakes said there was certainly too many good hops; he wouldn't leave them.

Q. Did you give any consideration to stopping your harvest when you got the hops off the good yard? Did you think of stopping your harvest at that time?

A. We weren't harvesting any one particular yard at any time. We had different sections in different yards at different times.

Q. At one time you had what you estimated to be 64 bales of mildew-free hops in one hopper, is that right?

(Testimony of O. L. Wellman.)

A. I didn't have them all in there, no.

Q. You had them separate from the other hops, is that right? A. I started to.

Q. You gave no consideration—You did not even think of stopping harvesting? [376]

A. At that time?

Q. And not mix up any other hops with these good hops? A. Just couldn't be done.

Q. Why not?

A. How are you going to have four sections and have one kiln, when you have only one storeroom?

Q. Couldn't you have stopped harvesting and baled up the 64 bales and then go ahead?

A. Three or four days late——

Q. Couldn't you do that?

A. It couldn't be done.

Q. Explain why it could not be done?

A. You have four sections in four different yards.

Q. Yes. You did harvest the whole yard?

A. I was harvesting the whole yard, yes.

Q. You had 64 bales or the equivalent of 64 bales of good hops off that yard. Isn't that true?

A. There was more in that yard.

Q. I think you said that yard was practically free of mildew?

A. I said it didn't have as much mildew as the other yard.

Q. Did you give any consideration to keeping these hops separate and stopping all further har-

(Testimony of O. L. Wellman.)

vesting in order to avoid mixing these better hops with the bad ones?

A. I think I answered that question once.

Q. You are content with that answer at this time, is that right? A. Yes. [377]

Q. When was it you returned from the hunting trip? October 5th, you said?

A. Yes, on Sunday.

Q. Was that October 5th?

A. I think it was October 5th.

Q. How soon after that was it that Mr. Noakes told you the procedure had been changed and from then on samples had to be sent back to the Washington office for acceptance or rejection? How soon after that was that?

A. It was shortly after that. I couldn't remember the exact date.

Mr. Kerr: I think that is all. Thank you.

(Witness excused.) [378]

Mr. Kester: That is all the rebuttal we have at this time, your Honor, until we see what the rest of their case may develop.

The Court: What are you going to do about argument?

Mr. Kester: I assume it would not be very practical to try to argue it until the case is closed.

The Court: You have two other cases. You can argue those.

Mr. Kester: I would be glad to suit the Court's

convenience on it. My understanding now is that anything that may come out in this case may relate back to the others, in so far as it may have any bearing on the general situation, so I suppose it would be difficult to close any of them until they are all closed.

The Court: I think you had better argue the case beginning tomorrow morning.

Mr. Kester: We will be glad to comply.

The Court: Are you ready to do that?

Mr. Kerr: Yes.

The Court: Is there any evidence in the case about what the usual method of paying is, as to the time and where payment is made, and who makes it?

Mr. Kester: I think very possibly we could stipulate on that. My impression is—Correct me if I am wrong—that the usual practice is that payment is made by check or sight draft.

The Court: When?

Mr. Kester: At the time the warehouse receipt is delivered.

The Court: That still begs the question. Where is the warehouse [379] receipt delivered?

Mr. Kester: Well, they would wait until after the leaf-and-stem analysis had come in, because the price would depend on that, I suppose.

The Court: I think you had better put in some testimony on that. You can gather it up in the courtroom right now, some witness who will testify to that.

O. L. WELLMAN

plaintiff, having been previously duly sworn, was recalled as a witness on behalf of Plaintiff, and was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. Mr. Wellman, is there any uniform practice in the hop business as to when hops are paid for?

A. It varies a lot with different concerns and sometimes on the conditions of different sales. I have sold hops and never have had to wait; when the job was completed, inspecting and weighing, they would give me my check right there. Sometimes the check would come out of the office; they sent them probably from their home office; the secretary or treasurer would send me a check.

The Court: You mean sometimes at the warehouse the field man would have a blank check and fill it out right there? [380]

A. Sometimes, yes.

The Court: Do you remember any case of their doing that?

A. Yes.

The Court: Go ahead.

Q. (By Mr. Kester): What is the custom as to whether or not payment waits for a determination of leaf-and-stem content?

A. That has delayed it some, when the OPA went in and they put hops under these OPA regulations and they enforced on the growers leaf-

(Testimony of O. L. Wellman.)

and-stem content at that time. Some years they got very far behind and we would just have to wait until they sent in the leaf-and-stem inspection certificate.

Q. After OPA went in, in 1944 or whenever it was, were you paid for your hops before the leaf-and-stem analysis had been made?

A. No.

Q. It always was after that?

A. Always after we had received the leaf-and-stem inspection certificate.

Q. In 1946, for example, do you recall about when you were paid?

A. Yes; I got a check from A. J. Ray & Son the 5th or 6th of November.

Q. What held it up that long?

A. The leaf-and-stem inspection. I think that was the date. I think they went through them a little later than they did in 1947. I don't know just what held it up, but I have got a record that shows I got paid for the 1946 crop in November of 1946. [381]

Q. After the leaf-and-stem analysis is in, is there anything else to hold up the making of payment, as far as you know, in the general practice?

A. No, there isn't.

Q. Then, when actual payment is made, what is the practice as to whether that is by check or draft or cash, or how it is handled?

A. It is mostly by check or draft, with the warehouse receipt attached.

(Testimony of O. L. Wellman.)

Q. Is it customary for a buyer at that time to prepare a statement or invoice showing computation of the deductions and so on?

A. They give you a tally sheet for the weights and then sometimes they are sent out of the Salem office or from some Portland office, or wherever their offices are—mostly out of one of their Oregon offices.

Q. Do they sometimes mail the checks to you rather than to deliver them in person?

A. Yes, they very often mail them to me.

The Court: You say you get local checks in final payment?

A. Yes, we have.

The Court: Locally?

A. We have had them from both places, from their office or the local representative, either one.

Q. (By Mr. Kester): If the office in Salem or somebody in Hillsboro, the Hillsboro office, might draw a check, would you have [382] any way of knowing where it came from?

A. No. We leave that up to the buyer.

The Court: Do you get checks from Washington or New York?

A. No, I don't.

The Court: You never have?

A. Never did.

Mr. Kester: Payment was always made through some branch of A. J. Ray & Son?

A. That is right.

(Testimony of O. L. Wellman.)

The Court: When you spoke of a warehouse receipt attached to a sight draft, wouldn't that draft be on the Washington office?

A. No, it would not. I had one out of Washington, a spot sale, and I turned it in to the bank and I told the bank to see that the check was good or that the money would be all right, that the check would be all right. That is the only deal I had outside, but that was a spot sale.

Q. (By Mr. Kester): At the time these various advances are made during the season, do you ever pay any attention to whether they were checks or drafts? Do you know the difference?

A. They were checks.

Q. Do you know who signed them?

A. Ray.

The Court: That has all been covered. [383]

Cross-Examination

By Mr. Kerr:

Q. Mr. Wellman, you requested specifically that the Government inspection of your late cluster hops be delayed until the tenth-bale samples were taken, and then made at the same time that the tenth-bale samples were taken?

A. No, I didn't request that.

Q. Didn't you request that the Government inspection not be made unless you were there?

A. Well, we done it in 1947 just like we did it in 1945 and 1946, because both the parties, Ray and S. S. Steiner, both parties wanted to be there

(Testimony of O. L. Wellman.)

when they took in them hops. The hops were split equally as they called out the numbers of the bales. They would have the inspector that took the leaf-and-stem content there on the same day. You couldn't hardly do that if you had a thousand bales; it would complicate matter so much more if the leaf-and-stem inspection was done separately.

Q. Ordinarily, the Government inspection is made sometime prior to the tenth-bale samples, or after the buyer's inspection?

A. Done with some small lots where the grower has one truckload or two truckloads, but where we put out anywhere from 90 to 150 bales on the warehouse floor it isn't. Sometimes they possibly get in a small lot and your State inspector isn't there; but where the warehouse floor is stacked with these bales, it just couldn't be done on these larger lots. [384]

Q. You say ordinarily the buyer has the Government leaf-and-stem certificate when he weighs in the hops?

A. The way I understand it, they will ask the State to make an inspection. In 1947 Mr. Eismann, in my presence, called the Department that day when we arranged for the use of that floor.

Q. What would you say as to the practice of other growers, other than yourself, or do you know?

A. I understood that is the way that was done with quite a few cases. It was done at the time of receiving or weighing-in.

(Testimony of O. L. Wellman.)

Mr. Kerr: That is all.

Redirect Examination

By Mr. Kester:

Q. In this case the inspection was for the account of the buyer, was it not?

A. That is right. They requested the inspection.

Recross-Examination

By Mr. Kerr:

Q. Isn't that the case in connection with all contract hops? The inspection by the Government is for the account of the contract buyer?

A. Yes. They request the inspection.

Mr. Kerr: That is all. [385]

Redirect Examination

By Mr. Kester:

Q. The buyer then pays the inspection fee?

A. They pay the inspection fee, yes.

(Witness excused.)

Mr. Kester: That will be all.

The Court: Do you want to put on any testimony?

Mr. Kerr: Yes. [386]

Defendant's Surrebuttal Testimony

HAROLD W. RAY

having previously been duly sworn, was recalled as a witness on behalf of Defendant, in surrebuttal and was examined and testified as follows:

(Testimony of Harold W. Ray.)

Direct Examination

By Mr. Kerr:

Q. Mr. Ray, you have testified previously in this trial? A. Yes, I did.

Q. State whether or not payment for hops purchased by A. J. Ray & Son for John I. Haas, Inc., has ever been made to the grower directly from John I. Haas, Inc.?

A. That never has been, in the entire history of these dealings.

Q. How is payment handled?

A. Up to a number of years ago we bought with sight draft on A. J. Ray & Son, but for the past few years we have been paying by check entirely, A. J. Ray & Son's check. Mr. Noakes has authority to issue checks to growers in payment of their hops.

Q. As a general practice, how soon after A. J. Ray & Son accept hops for the account of John I. Haas, Inc., does A. J. Ray & Son pay the grower for those hops?

A. After the inspection certificate has been issued and we know what the analysis it, immediately a check is given to the grower, but in case the inspection certificate has not been received we are forced to wait until it has been issued so that we know how to pay. [387]

Q. When the inspection certificate is received, what is your practice with respect to paying the grower?

(Testimony of Harold W. Ray.)

A. We pay it just as promptly as we are able to get in touch with the grower. We pay as promptly and as fast as possible. Sometimes there is a little delay in getting in touch with the grower, for one reason or another.

Mr. Kerr: That is all.

(Witness excused.)

The Court: Mr. Kester and Mr. Dougherty, what effect, if any, are you going to concede in this case to the tenth-bale samples, in this case we have just finished? What is your theory about that?

Mr. Kester: I am not sure that I got your Honor's question. Of course, we take the position that there was no such an agreement, as is claimed by the defendant here, and in the ordinary practice weighing-in——

The Court: Listen. Take the other man's testimony as given. What is your position? They claim that the tenth-bale samples were a condition to acceptance. What is going to be your argument?

Mr. Kester: Of course, your Honor, we take the position in this case that there was no such an agreement. If the Court should hold that there was an agreement, that would make——

The Court: You just forget what I am going to hold. What [388] is going to be your answer to their theory?

Mr. Kester: I would say this, although I am not sure that I get exactly what your Honor is driv-

ing at. It is our understanding of these contracts that the contracts require the buyer to make an inspection and to act with reasonable diligence. I think in the trade that means to have someone at the warehouse who is prepared to accept the hops and who has authority to either accept or reject. There are a great many Oregon hop cases, as I understand it, which require that the buyer be prepared to either accept or reject. We feel they were under a duty to make an inspection with reasonable diligence.

The Court: Well, you mean you do not allow any time for the tenth-bale samples?

Mr. Kester: Ordinarily, as to the tenth-bale samples, the only question as to them is whether they correspond with the type samples. In other words, the buyer has had type samples in this case for over a month. The only question is whether the tryings which are talked about here correspond with the type sample which the buyer has previously had for inspection. If they do correspond, then the man on the job will weigh them in and, as they go over the scales, the practice, as we claim, is that they become the property of the buyer. The tenth-bale samples, as I understand it, are merely a means of giving the buyer samples which he can, in turn, use to sell to his [389] customers. We contend that the real question is that at the time of inspection whether the tryings correspond with the type samples the buyer previously has had.

The Court: Is there testimony in this case that will bear out what you have just said?

Mr. Kester: I am under the impression that there is, your Honor. If such testimony has not been introduced, we will be glad to go over it again, to be sure.

The Court: Do you want to say anything, Mr. Kerr?

Mr. Kerr: With respect to the tenth-bale samples, your Honor, I do not recall any evidence whatsoever to the effect that tenth-bale samples were taken merely for the purpose of providing the buyer with samples to show to customers. I do not know of any such evidence. We will certainly put in evidence to the contrary.

The Court: We will recess for ten or fifteen minutes, and then if either of you want to add anything to the record you may do so, and then at a later date we will hear this man from the East.

(Recess.)

Mr. Kester: We would like to call a couple of witnesses, your Honor, and before closing the case I would like to mention two things before I forget it.

In the event some amendment may become necessary, we would like that privilege. [390]

The other is, in connection with the hop book that Counsel produced yesterday, we are having photostats made today and we would like permission to offer those photostats when made.

Mr. Kerr: As to the photostats of the hop book,

I think they should be limited to Mr. Wellman's hops, the records pertaining to those hops. I believe for any other purpose they would be immaterial and we would object to their introduction in evidence, other than strictly relating to the Wellman hops.

The Court: When offered, I will rule.

RAY J. GLATT

having been previously duly sworn, was recalled as a witness on behalf of Plaintiff and was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. Mr. Glatt, the question has been raised to what the customary procedure is on inspection in the warehouse. I wonder if you would explain to us, from a grower's standpoint, just what happens when hops are weighed and inspected at the warehouse, what the course of events is as to just what happens, under the usual custom and practice in the trade.

A. Before inspection of hops, of course, there are type samples [391] taken of the particular lot of hops, and that may be one or two or three samples. As the inspection is made, if there are no markings put on the bales, there are tenth-bale samples taken. These tenth-bale samples are compared with the type sample as well as the tryings.

Q. Assume the bales have been pulled down at the warehouse and have been lined up on the ware-

(Testimony of Ray J. Glatt.)

house floor, is there anything that is done to them in the inspection procedure? Do they take tryings the first thing?

A. Generally, tryings are taken first and tenth-bale samples are taken sometime after the tryings are taken and are not taken the same time while the tryings are being pulled, but I believe generally the tryings are taken first.

Q. When tryings are taken, that is about a handful of hops from each bale?

A. Yes, just about a handful of hops taken out of the side of the bale and placed on top of the bale, generally. These tryings are taken to the light and inspected and compared, of course, with the type sample that was taken originally.

Q. If there is anything wrong with the bale at that time, for instance if it is slack-dried or not dried, or if it has any mold from being in the warehouse, or if there is anything wrong with the bale, does that usually appear in the tryings that are taken?

A. Well, it might, yes, and of course it might appear also when [392] the tenth-bale sample is taken, but generally it should appear when the tryings are taken.

Q. If something appears to be wrong with the bale so that the buyer does not want to accept that bale, what is the practice as to whether or not that bale is weighed and numbered?

A. That bale generally is set out, and the buyer

(Testimony of Ray J. Glatt.)

would notify the grower that that bale would not be acceptable. Frankly, I haven't had that experience.

Q. But that is the usual practice?

A. Yes.

Q. Then, if he sets that bale out, is that bale thereafter weighed and numbered?

A. Well, if he rejects that particular bale, it is not weighed or numbered.

Q. It is not weighed or numbered if it is set out there? A. Correct.

Q. When tenth-bale samples are taken, is there an examination or comparison usually made?

A. Yes, the tenth-bale samples are examined or compared with the type samples that were taken originally.

Q. Is that for the purpose of determining that they are a fair representation of the lot, or what is the purpose of taking the tenth-bale samples, if any?

A. I assume the purpose of the tenth-bale samples is to determine as to whether or not the entire lot of hops runs true to the type [393] sample.

The Court: Are tenth-bale samples always taken?

A. As far as my experience is concerned, Judge, they are.

The Court: Where are they usually taken? At the warehouse?

(Testimony of Ray J. Glatt.)

A. At the warehouse, generally, after the tryings are taken from the bale.

The Court: What is done with them? Where do they go?

A. The buyer wraps them up and they are in his possession.

The Court: Do they go to New York or Washington or to Hillsboro, or where do they go, usually?

A. That is a question I could not answer, as a grower.

Q. (By Mr. Kester): From the standpoint of the grower, does he know or care what the buyer does with the tenth-bale samples?

A. As a grower myself, it is immaterial to me what he does with the tenth-bale samples.

The Court: What is the difference between tenth-bale samples and tryings? Just in quantity?

A. Tryings is drawn from the side of the bale, just a small handful of hops, customarily taken from the side of the bale.

The Court: The difference, then, is only in quantity?

A. Yes. It is all the same hops. It is a difference in quantities.

The Court: Why, if you have tryings of each bale, do you need tenth-bale samples, also?

A. I assume a buyer could answer that better than I can, Judge, [394] but it gives the buyer a

(Testimony of Ray J. Glatt.)

better chance to make a thorough inspection of the hops.

The Court: Goes into the bale deeper?

A. And takes a larger amount, yes. I assume that they can be used for the sale of those hops to the final consumer.

Q. (By Mr. Kester): Is it a fact that the tool with which the tryings are taken is long enough so that the tryings can be taken out of any part of the bale that the inspector wants to?

A. That is correct.

The Court: Had you ever known of a case prior to 1947 when acceptance was conditioned on the tenth-bale samples having been found satisfactory?

A. Not as far as my experience is concerned.

Q. (By Mr. Kester): What is the fact as to whether or not a tenth-bale sample, taken in the warehouse, at the time of inspection, is broken open or split, or is it kept intact in its original form?

A. It is generally kept intact, as far as my experience is concerned.

Q. Then it would be wrapped up in the same form and shape as when it came out of the bale, is that right? A. That is correct.

Q. After it has been wrapped up, the grower does not know thereafter what happens to it?

A. No, I think not. [395]

Q. I think you may have mentioned it before, but how long have you been growing hops?

(Testimony of Ray J. Glatt.)

A. Oh, about twenty years.

The Court: Are tenth-bale samples always taken at the time of inspection?

A. As far as my experience is concerned, they have been.

Q. (By Mr. Kester): Let me ask this: Are tenth-bale samples always taken out of every tenth bale numerically, or do they sometimes select them at random?

A. Sometimes they take them numerically and sometimes they are taken at random so they would get tenth-bale samples out of the entire lot.

Q. Is the taking of these tenth-bale samples a normal part of the inspection routine?

A. It is, yes.

Q. What is the usual practice as to whether or not, when a bale is run over the scales, it is considered that bale has been accepted by the buyer?

The Court: Don't get into a lot more trouble. I just wanted to hear about these tenth-bale samples. Don't open the case up again. We have been trying these cases now for six or seven days, it seems.

Mr. Kester: May I inquire if what has been brought out now answers what the Court has in mind?

The Court: I will answer that when I decide the case. [396]

Mr. Kester: Very well.

(Testimony of Ray J. Glatt.)

Cross-Examination

By Mr. Kerr:

Q. You say the purpose of the tenth-bale samples is to assist the buyer in determining whether or not the hops are of a particular grade, quality or condition?

A. That has been my impression, yes. It is a part of the inspection.

Q. Tryings are taken ordinarily from each and every bale, are they not? A. That is correct.

Q. Whereas tenth-bale samples are drawn only from every tenth bale? A. That is correct.

Mr. Kerr: That is all.

Redirect Examination

By Mr. Kester:

Q. In the usual practice when does the buyer normally make his decision as to whether or not the bales are of the quality desired?

A. It is made after the tenth-bale samples are taken and after the tryings are taken from that particular lot of hops.

Q. Is it made before they go over the scales?

A. I assume it is. It is taken for granted when the tryings [397] are taken and the tenth-bale samples are taken and the hops usually are weighed in, providing there is an agreement before all of this procedure that the hops are acceptable.

Q. You say "providing there is an agreement." What do you mean?

A. I mean that there is an understanding between the buyer and the seller that the hops are

(Testimony of Ray J. Glatt.)

going to be sold for a certain price, and that price will be determined upon the type samples that were taken previously.

Q. In other words, if the price has been agreed upon? A. Yes.

Mr. Kester: I think that is all.

Recross-Examination

By Mr. Kerr:

Q. Then you say it is a matter of intention between the parties as to when the hops have been accepted; the two parties must have agreed if there is acceptance? A. That is correct.

Mr. Kerr: That is all.

Redirect Examination

By Mr. Kester:

Q. What you are saying is what happens in the usual course of business, the practice in the trade as to what is acceptance in [398] the usual course, is that right? A. I think that is correct.

(Witness excused.)

Mr. Kester: I might say I was prepared to call another witness to confirm this, your Honor.

The Court: Put him on if you want to.

Mr. Kester: My only point is I believe the statute requires two witnesses to prove custom. If Counsel will agree that if I call another one he would say the same thing, that will have been taken care of.

The Court: You had better do just what you think you need to do.

KILLIAN W. SMITH

was thereupon produced as a witness on behalf of Plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. Mr. Smith, I do not believe you have testified previously in this case as you have in the other case? A. Yes, that is right.

Q. Would you state what is the usual practice in the business, or what is done at the time the hops are weighed and inspected [399] at the warehouse?

A. At the time the hops are inspected at the warehouse they are lined up, and the inspector tries each bale with a trier to determine whether they are in sound condition, whether they are dry, dried right, or whether there is any mold or any particular thing wrong with them. Then he puts these tryings on top of the bale and if the bales are all okeh he will take tenth-bale samples to confirm the fact that these tryings are the same as those tenth-bale samples. He will compare them together to make sure that the tryings and the tenth-bale samples represent the lot of hops at the time of the taking of the lot of hops. If he does not throw a bale or two out for some reason or other, he will number the bales, then, and weigh them in. After they are weighed in, the grower, if he has all his papers, if he has his certificate, his State

(Testimony of Killian W. Smith.)

certificate, and his warehouse receipt and all the other necessary things, settlement is made then, usually.

Q. If he does not have his inspection certificate, is settlement held up until he gets that?

A. That is right.

Q. Are tenth-bale samples always taken at that time? A. Yes.

Q. At that time do they always have type samples that have been previously taken for comparison?

A. Not always. Previously, during the war, while I was working [400] for Mr. Seavey, not in all cases did I take initial type samples; but if we did, he would give me the okeh from that type sample to go ahead and take in the lot. Of course, the lot would have to run uniform to that and the tenth-bale samples would bear that out. You also find, in taking tenth-bale samples, that you get down deeper into the bale and get a bigger portion, and also determine whether there may be some slack-dried hops or something materially defective.

Q. If something is found wrong with one bale, on examining the tryings and, as you say, it is set out, is that bale counted in the determination of the tenth-bale samples to be taken?

A. Usually not. Sometimes they don't take tenth-bale samples; that is, of each tenth bale. They might take seven out of a hundred or out of any number. Generally if a bale is set out it is the

(Testimony of Killian W. Smith.)

grower's property again and he can either take it home and re-dry it, if it is otherwise acceptable, or work it over and bring it back for later acceptance. Then it is counted in the entire lot if it comes in and passes inspection.

Q. If for any reason one is set out and not taken at that time, is that bale weighed and numbered at that time?

A. No, usually don't do that because it might spoil the chance of a sale. These bales that are set out, they usually never put a mark on them because they are the grower's property, and if he re-dries them and works them over and puts them in marketable shape, he may sell them to some other dealer but, if there is [401] any marking on them, it might spoil the sale.

Q. If a bale is set out, as you say, and not accepted, does the buyer have any concern with how much it weighs? A. No.

Q. After tenth-bale samples are taken, what is ordinarily done with those?

A. Those are usually sent to the East—well, they are always sent in to the office and, after they reach the office, why, they are usually sent to the ultimate consumer or, if the buyer is acting for an Eastern broker, they are sent to him and he makes his disposition of them, probably to the trade or to the consumer or maybe he just keeps them there to represent the whole lot of hops.

Q. From the standpoint of the grower, does he

(Testimony of Killian W. Smith.)

know or care what the buyer does with those tenth-bale samples?

A. No, sir; that is never of any particular concern to the grower. In fact, they don't like to have you take too many samples because they don't usually get paid for those, because the hops are weighed after the samples are taken.

Q. How much does each sample weigh?

A. From a pound to a pound and a half.

Q. Is the burlap wrapping cut or damaged when one of these samples is taken?

A. Yes, the burlap is cut back about a foot and it is opened at the seam, in an angular shape. After the sample is drawn and [402] trimmed up, why, the trimmings go back into this hole that the sample is pulled out of and then the hole is sewed up by the inspector.

Q. So it is apparent when you look at the bale whether or not samples have been taken in that manner?

A. Oh, yes.

Q. What is the fact as to whether or not the fact that samples are taken out of the bales has any effect on a subsequent sale?

A. Well, it is always noticed by a buyer or inspector, and he usually asks or he finds out for himself by use of his trier.

Q. What is the ordinary practice in the business about making acceptance of a lot of hops dependent upon approval of the tenth-bale samples or the taking of tenth-bale samples?

(Testimony of Killian W. Smith.)

A. Not while I was buying hops.

Q. Over how many years have you been in the hop business?

A. I have raised hops for nine years and I worked for Mr. Seavey for not quite four years.

Q. In working for Mr. Seavey, you were a buyer or commission man, I think you said?

A. I was a commission man and inspector. I didn't inspect all the hops but inspected only what I was told to by Mr. Seavey; and if I was told by Mr. Seavey to pay him, I would do it, and sometimes if all the papers were available, if the grower had them at that time, he would issue a sight draft, and the sight draft must have the warehouse receipt attached to it when it [403] goes through the bank.

Mr. Kester: I think that is all.

Cross-Examination

By Mr. Kerr:

Q. When hops are not under contract and are offered for sale as spot hops, they usually have many samples taken from them, do they not?

A. Some lots do and some don't.

Q. Would you say that the taking of tenth-bale samples by the buyer is always for the purpose of determining their grade, quality and condition of the hops?

A. They are usually taken to bear out the fact that they conform to the tryings and are an indica-

(Testimony of Killian W. Smith.)

tion that the whole lot of hops is represented by the tenth-bale samples, yes.

Q. In other words, you agree the practice of the tenth-bale samples is to determine the grade, quality and condition of the lot?

A. That is right.

Q. Do you remember Jock Lawson?

A. I have heard of him.

Q. A buyer of hops? A. Yes.

Q. Do you remember that his practice was to send tenth-sale samples back to the Eastern office?

A. I don't know how he conducted his particular business.

Q. Do you remember an occasion when he took and sent such tenth-bale samples back and the lot was rejected because of the resin content of those hops? A. No.

Mr. Kerr: That is all.

Redirect Examination

By Mr. Kester:

Q. You say the purpose of tenth-bale samples is for determining the grade, quality and condition. Is it to determine that for the information of the buyer or so he can communicate with anyone?

A. I don't quite get that question.

Q. When you say that tenth-bale samples are taken for the purpose of determining grade, quality and condition of the hops, is to tell the particular buyer at that time of the condition, or is it so he can have samples that tell his buyers what the con-

(Testimony of Killian W. Smith.)

dition of those hops is, or both? What is the fact?

A. Well, if those samples don't bring out the true representation of the lot, why, they are usually rejected right there.

Q. Did you know Jock Lawson?

A. It has been a great number of years ago. By that I mean fifteen or twenty or twenty-five years ago.

Mr. Kester: I think that is all.

(Witness excused.) [405]

Defendant's Additional Testimony

HAROLD W. RAY

a witness on behalf of Defendant, having previously been duly sworn, was recalled and was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. You have testified in this case previously, have you not? A. I did.

Q. Your name is Harold W. Ray?

A. Harold W. Ray.

Q. Is it customary in the hop trade for a buyer to take tenth-bale samples of a lot that he has under contract to purchase? A. It is, yes.

Q. What is the purpose of taking the tenth-bale samples?

(Testimony of Harold W. Ray.)

A. To assist in the determination of the quality and condition of the hops.

Q. State whether or not such tenth-bale samples are taken customarily for the purpose of providing the buyer with samples to furnish to breweries or other customers?

A. I think not. The real purpose is in drawing the tryings, a handful out of each bale, in so doing the hops are quite badly broken up and you would be unable to definitely determine the condition of the hops as to their wholeness and flaky condition. We leave that to the full-sized tenth-bale samples, and it is a part of the process of determining the quality and condition of [406] the hops.

Q. Reference has been made by testimony introduced by the plaintiff about the practice or alleged practice of buyers accepting hops on the basis of tenth-bale samples, acceptance being made at the time the samples are drawn. State what your practice has been with respect to that?

A. It has been our custom, prior to 1947—prior to that time it was our custom, with the exception of some extenuating cases, that John I. Haas, Inc., would advise us whether or not they were willing to accept on the basis of the type sample. In other words, if, in our opinion, the hops equalled the type sample, they would or would not accept, and it was up to A. J. Ray & Son or their inspectors, in case they said they would accept on type samples, to determine whether or not the entire lot of hops ran equal to those type samples.

(Testimony of Harold W. Ray.)

Q. Under those circumstances did you use tenth-bale samples for the purpose of determining the grade, quality and condition?

A. We used those tenth-bale samples at the time of inspection in determining whether or not the hops were—what the quality and condition of the hops were and whether or not they were equal to the type sample.

Q. What was the practice in 1947?

A. In 1947 we were not permitted to pass upon the quality of the hops and John I. Haas, Inc., for the most part, would not determine whether or not they would accept on the basis of type [407] samples only, and instructed us that they must have tenth-bale inspection samples to correctly and accurately represent the hops, before they would determine whether or not they would accept them on the contracts.

Mr. Kerr: That is all.

Cross-Examination

By Mr. Dougherty:

Q. Ordinarily, in taking tenth-bale samples, do you exercise great care to be sure that they do correspond to your previous type samples?

A. We don't do that, Mr. Dougherty. We take care that these tenth-bale samples accurately represent the quality in the lot of hops.

Q. The purpose, then, is to be sure that these samples are representative of that particular lot of hops?

A. Correct. That is true.

(Testimony of Harold W. Ray.)

Q. Is it the established custom for you to send tenth-bale samples forward to John I. Haas, Inc., in Washington, D. C.?

A. A split of the tenth-bale samples, it has been our custom; and we would retain the other portion of the samples in our office.

Q. Do you know whether or not John I. Haas then may, in certain cases, use those samples and exhibit them to their customers?

A. I think that is not the usual custom, Mr. Dougherty. I think [408] I can say I have never known of cases where we submitted or drew tenth-bale samples to be delivered to the ultimate purchaser or to the brewery, but just what they do with them I cannot tell you.

Q. Is the taking of tenth-bale samples a normally established part of the inspection routine?

A. Yes, it is.

Mr. Dougherty: Thank you.

(Witness excused.) [409]

Mr. Hill: I have here, your Honor, an amended answer which conforms to the amended answer I requested permission to file several days ago. I have served a copy upon counsel.

The Court: It may be filed.

(Thereupon an adjournment was taken until 10:00 o'clock a.m. the following day, February 3, 1949.) [410]

10:00 o'Clock A.M., February 3, 1949

Mr. Kester: Before we begin the argument, your

Honor, we have now obtained photostats of the 1947 portion of Mr. Ray's hop book, and we have had them marked as Exhibit 17. We will offer them in evidence.

Mr. Kerr: We have no objection to the receipt in evidence of such portions of these records as relate directly to the Wellman account.

I believe, in examining the photostat sheets, that only one of the sheets referred to by Counsel covers the Wellman account and therefore I suggest that the offer be limited to that one sheet.

The other sheets relate to accounts having no connection with the Wellman account and, therefore, we submit they are irrelevant and are not applicable to the issues in this case at all, and we therefore object to the introduction in evidence of any portion of this material except Sheets 8 and 9 or Pages 8 and 9, the last on which refers to the Wellman fuggles, and of course we ask that the exhibit be limited in its use in this case to that particular entry.

Mr. Kester: I certainly do not consent that our offer be limited in that manner. It is our view that this entire book, in so far as it pertains to that year, is highly important, [411] relevant and material for a number of reasons.

In the first place, the defendant himself has brought into the case the subject of contracts with other growers, and, if for no other reason, it is relevant because of that situation. The defendant himself has brought it into the case. There has

been a great deal of evidence here as to how A. J. Ray & Son acted with other growers, how their buyers acted with other growers. There is correspondence in the case between A. J. Ray & Son relating to other growers' transactions. They have offered evidence as to agreements that they entered into with other growers and with respect to handling contracts of a similar nature with other growers. All of that has come into the case and, certainly, we are entitled to these records being complete and introduced in the evidence of this trial.

In the second place, there are some very important admissions of fact in these documents pertaining to the construction of this contract as a type contract, as shown by the conduct of A. J. Ray & Son in interpreting this contract themselves. For example, Mr. Ray testified with respect to what they customarily took in under other contracts as hops being cleanly picked. There is evidence here that they took 12 per cent, 13 per cent, 14 per cent picks of other growers, so long as the price was low, and shipped the hops to breweries. Certainly that is a very important admission with respect to Mr. Ray's testimony as to how he construed and applied these [412] contracts, so it is our view that this whole subject as to how Haas and Ray interpreted, as a practical matter, the type of contract that we are here concerned with, in their dealings not only with Wellman but with other growers, because of the fact that this is the same type of contract—it is our view that is

very important in establishing what this contract was actually meant to be between the parties and how it was construed in the trade during 1947.

The Court: Admitted, subject to the objection.

(Photostatic copy of records of John I. Haas, Inc., covering hop purchases and sales, thereupon received in evidence and marked Plaintiff's Exhibit No. 17.)

(Argument of Counsel.)

(Thereupon the above-entitled cause was continued until Saturday, February 5, 1949, at 10:00 o'clock a.m.) [413]

10:00 o'Clock A. M., Saturday, February 5, 1949.

FREDERICK J. HAAS

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. Will you state your name, please?

A. Frederick J. Haas.

Q. Where do you reside?

A. Washington, D.C.

Q. What is your occupation?

A. Principally in the hop business.

Q. What is your connection with the defendant in this case, John I. Haas, Inc.?

A. The defendant in the case—my connection with the defendant in the case?

(Testimony of Frederick J. Haas.)

Q. Yes.

A. I am Vice-President of the company.

Q. How long have you been connected with the corporation? A. Since 1926.

Q. Where do you maintain your office?

A. In the Metropolitan Bank Building in Washington, D.C.

Q. Is that the main office of the corporation?

A. That is our main office, yes.

Q. You are a son of John I. Haas, are you not?

A. That is correct.

Q. State how long John I. Haas, Inc., has been in the hop business as a dealer?

A. Since 1916.

Q. Will you state the area over which it buys and sells hops?

A. We buy hops in the United States and grow hops in the United States and Canada, and sell hops in the United States, Canada, Mexico, South America, and, before the war, in the European countries, also in the Far East wherever possible.

Q. The corporation also owns hopyards, does it?

A. That is correct.

Q. They are located where?

A. In the States of Washington, California and Oregon.

Q. How many yards does it own and operate in Oregon?

A. Well, there are three separate and distinct farms in Oregon.

(Testimony of Frederick J. Haas.)

Q. In what areas are they located?

A. The Independence-Salem area.

Q. Do you perform any duties with respect to the operation of these yards?

A. I do.

Q. What are those duties?

A. I am in charge of the production of these farms.

Q. Including the Oregon farms? [415]

A. In a supervisory capacity. Yes, including the Oregon farms.

Q. Were you in Oregon in September, 1947?

A. I was.

Q. At that time did you see samples of the Otto Wellman late clusters, 1947 crop of hops?

A. Yes, sir; I did.

Q. Where did you see them?

A. I saw those in Mr. Ray's office.

Q. Do you now recall those samples?

A. Yes, I do. I recall and I have refreshed my mind since.

Q. State the quality, grade and condition of the samples which you at that time saw?

A. Well, the samples I first saw in Mr. Ray's office, when he showed them to me I thought they were very poor. They were reddish color and the picking did not appear to be very good.

Q. Did they show any damage by mildew?

A. Yes, they did.

Q. How did that damage appear?

(Testimony of Frederick J. Haas.)

A. In little red nubbins throughout the hops and red petals on some of the whole hops.

Q. State whether or not such samples were of prime-quality hops, as that term is used in the trade? A. No, they were not.

Q. Why not? [416]

A. Well, because prime-quality hops are always considered even-colored hops and cleanly picked, whereas these hops were not in that specification.

Q. Is freedom from damage by mildew one of the requirements of prime quality? A. Yes.

Q. Were these particular hops free from damage from mildew?

A. No, by physical examination it was quite obvious they were not.

Q. Did you also see the tenth-bale samples of these 1947 cluster crop of hops which were sent to the Washington office of John I. Haas, Inc.?

A. Yes, I saw those later in Washington, D.C.

Q. Did you examine them personally?

A. I did.

Q. State whether or not in your opinion those hops were of prime quality?

A. No, they were not.

Q. Why not?

A. Because of damage by disease, that obviously being mildew, and because of the poor picking.

Q. State whether or not the damage by mildew that you have referred to was a substantial damage? A. Very. It was very substantial.

(Testimony of Frederick J. Haas.)

Q. Do you know why the Otto Wellman 1947 crop of late cluster [417] hops were rejected by your firm? A. Yes, I do.

Q. State the reason?

A. The principal reason was because they were not up to quality, the quality standards required under the contract, and they were not free from disease such as the specifications called for in the contract, and they were not cleanly picked.

Q. The evidence shows, Mr. Haas, that according to the official State Inspection Certificate the cluster hops were analyzed at 11 per cent leaf-and-stem content.

State whether or not such percentage of such content is considered in the hop trade as cleanly picked hops? A. No, it is not; certainly not by the breweries who use them.

Q. Is it considered a cleanly picked hop by dealers? A. Not by us.

Q. Was the rejection of the Wellman late cluster hops, 1947, motivated in any degree by the market price then prevailing for cluster hops?

A. Absolutely not, because we rejected many hops that were of lower prices that we had under contract because of the same deficiency.

Q. Did the rejection of such late cluster hops by your firm in 1947 make it necessary for your firm to go out and replace those hops at the prevailing market price?

A. It certainly did. [418]

(Testimony of Frederick J. Haas.)

Q. Have you any notations as to quantities?

A. I have. I have brought some figures with me which I could give you.

Q. Where did you get those figures?

A. From the records in our office.

Q. Will you state those figures to the Court, please?

A. Well, the 1947 crop, your Honor, we rejected in Oregon a total of 1,036 bales at 85 cents a pound because of the quality deficiency, a total of 318 bales which we had under contract at 45 cents per pound; a total of 330 bales which we had under contract at 60 cents a pound and hops which we had under contract at 85 cents a pound and at 50 cents a pound.

We accepted in Oregon on contract 4,886 bales of 1947 clusters which we had on order, on contract with growers, at between 80 and 90 cents per pound. We purchased a quantity, a total quantity of 4,886 bales.

At the same time, in order to replace rejections, we bought, between September 2nd and November 11, 1947, a total of 1,265 bales on the open market at a price of 85 cents per pound, with the exception of two small lots which we bought at 80 cents a pound. Those were used to replace hops which were rejected. We had to fly them in in order to make our deliveries.

Q. At the time you were in Oregon in September, 1947, did you have any discussion with Mr.

(Testimony of Frederick J. Haas.)

Harold Ray of A. J. Ray & Son, about inspecting, taking samples, and weighing of growers' hops [419] in Oregon? A. Yes, I did.

Q. Will you state the nature of those conversations?

A. Well, we instructed Mr. Ray or his office to take tenth-bale samples out of these various lots, with the understanding that the tenth-bale samples were purely for inspection purposes and that the weighing was in no manner to constitute delivery, because we did not know the quality of these hops until we examined them and the weighing was principally, as I understand it, a matter of convenience to the grower and to the person who was doing the weighing.

Q. Will you explain a little more what you mean by the weighing? Was it a matter of convenience to the parties?

A. I believe there was some limitation on these contracts, when they were supposed to be taken in, and, since there were quite a few contracts to be taken in, Mr. Ray said they naturally had to get around and do the best they could, to try to do all this work in a limited space of time.

Consequently, if the lot had only been inspected at that time and not weighed, it would have meant that the inspection staff would have had to go back to that particular lot to do the weighing, whereas in this way they could get it all done on the same trip.

(Testimony of Frederick J. Haas.)

Q. That is to say, if you had merely taken tenth-bale samples and then inspected the hops later on the basis of those samples, [420] and they had been accepted by your Washington office, it would have been necessary to then go back and weigh the hops, is that right?

A. Of course. That is exactly it.

Q. Did you have any conversation with Mr. Ray during your September visit in Oregon concerning getting an agreement or understanding from each grower that such tenth-bale sampling and inspection would not constitute acceptance of the hops? A. We did.

Q. What was the nature of those conversations?

A. Well, we told Mr. Ray—for the sake of convenience, it was mutually agreed between him and our office that this was a very convenient method to do that, but told him under no circumstances was this to constitute an acceptance of the hops, but merely the weighing of them.

Q. In rejecting the Wellman cluster hops, was it the intent or purpose of your firm to beat the grower down on his price? A. Certainly not.

Q. Did you give any instructions to A. J. Ray & Son on the subject?

A. Of how he should handle his contracts, you mean?

Q. On the subject of handling hops of doubtful quality? A. We did.

Mr. Kerr: If the Court please, Mr. Ray this morning referred me for the first time to a letter

(Testimony of Frederick J. Haas.)

addressed to A. J. Ray & Son, [421] Inc., under date of September 16, 1947, from John I. Haas, Inc., which bears on this subject, containing instructions to A. J. Ray & Son concerning the handling of these hops.

The Court: You may put it in.

Mr. Kerr: I knew nothing of this letter until Mr. Haas, rather than Mr. Ray, called my attention to it.

The Court: Put it in.

(Letter dated September 16, 1947, John I. Haas, Inc., to A. J. Ray & Son, marked Defendant's Exhibit No. 18.)

Mr. Kerr: Mr. Ray got this letter out of the file, your Honor. Mr. Ray has asked me to explain to your Honor he had not mentioned it previously to me or produced it in response to Plaintiff's counsel's request in this case, because it does not refer to Mr. Wellman specifically and he did not understand that it might have a bearing on the case.

Q. Mr. Haas, there has been handed to you a letter which has been marked Exhibit 18. Will you state whether or not that includes the instructions that you have just referred to?

A. Just a moment, please. Yes, this is the paragraph I was referring to here in the letter.

Q. That letter is of what date?

A. September 16, 1947.

Q. Addressed by your firm to A. J. Ray & Son, Inc.?

A. That is correct. [422]

(Testimony of Frederick J. Haas.)

Q. Will you read the paragraph of that letter that you are referring to, or that you referred to previously?

A. The paragraph reads: "The only thing we see to do is not to make settlement with these cluster growers until you have had the lots analyzed for picking and also sent in a line of samples so that we can judge whether or not the hops can be taken over by us and delivered to brewers. In fact, we believe we will have to submit many more samples of Oregons to brewers this year than usual because of the quality, as we are certain to have rejections if we ship this red stuff to brewers without giving them advance notice."

There is another paragraph, but I guess that is not pertinent.

Q. Is there any further reference to the general instructions that you refer to there?

A. Yes. "It is true that we need all of the hops we can get, but in the case of some of the larger growers where a part of their crops is trashy we may have to take the better part of the crops and reject the balance, which of course we are fully entitled to do under the contracts. On this poor, trashy stuff it will not be a case of trying to get the grower down in price, but will be a case of simply not being able to use the hops at any price."

Q. State whether or not the portions of the letter you have just read accurately and truly

(Testimony of Frederick J. Haas.)

describe the attitude and conclusions [423] of your firm as of the date of that letter?

A. I think it does, and I think our operations confirm that.

Q. To your knowledge, were prime-quality hops produced in Oregon in 1947?

A. Yes, they were.

Q. To your knowledge, were prime-quality late cluster hops produced in Oregon in 1947?

A. Very few.

Q. Does the term, or the standard, rather, of quality expressed by the term "prime quality" vary from year to year?

A. Not in our opinion, it does not. I don't think it does.

Q. Does "prime quality" as that term is used in the hop trade mean the average quality of merchantable hops produced in a particular year in a particular area?

A. Oh, no.

Q. Would such a standard be practicable?

A. Not by the standards under which we sell to the brewing trade.

Q. What is the effect of the standards imposed upon you by the brewers?

A. Will you please repeat that question? What is that?

Q. Does the brewing trade fix standards of hops in the hop trade?

A. Definitely, because they are the ones that are the consumers. We do not use the hops. [424]

(Testimony of Frederick J. Haas.)

Q. State whether or not the definition of contract quality included in your contracts with growers for Oregon hops sets forth the standards generally applied by the brewing trade in buying hops from dealers? A. I believe it does.

Q. What is the purpose of taking tenth-bale samples in connection with the inspection of growers' contract lots?

A. Well, the purpose is to get an average run of the quality of the lot.

Q. Are those samples sent back to Washington, to the Washington office, also used by your office in representing those hops to prospective customers?

A. That is correct. We inspect them and then we send them out to brewers to whom we submit them on contract.

Q. Are sales to brewers based upon samples?

A. In most cases, yes.

Q. Has John I. Haas, Inc., ever authorized A. J. Ray & Son, Inc., to waive any provision of the written contract between John I. Haas, Inc., and Otto Wellman covering Otto Wellman's 1947 crop of late clusters?

A. Not to my knowledge, no.

Q. Has it ever authorized Mr. Ray to waive any provision of that contract?

A. Definitely not.

Q. Has it ever authorized Mr. Noakes to waive such contract [425] provisions? A. No.

(Testimony of Frederick J. Haas.)

Q. Has it ever authorized anyone else, to your knowledge? A. Certainly not.

Q. Has it ever authorized anyone else, to your knowledge, to waive the contract? A. No.

Q. Has it ever authorized anyone, to your knowledge, to change the provisions of the written contract referred to? A. No, certainly not.

Q. To your knowledge, has John I. Haas, Inc., ever authorized anyone to accept any of Mr. Wellman's late cluster hops, 1947 crop of hops?

A. No, not to my knowledge.

Q. Has John I. Haas, Inc., ever been sued before in Oregon?

A. Not to my knowledge, never.

Q. Has it ever been sued anyplace by a grower?

A. No, we have never been sued.

Q. This is the first time that John I. Haas, Inc.,—

A. To my knowledge.

Q. —to your knowledge, that John I. Haas, Inc., has been sued by a grower, is that right?

A. That is correct.

Q. Do you know whether or not hops sold by your firm to brewers are sold on the basis of chemical analyses? [426]

A. Never. We have never sold a bale of hops to anyone on the basis of a chemical analysis.

Q. Have you ever bought any hops from any grower based on a chemical analysis?

A. No, we have never done that either.

(Testimony of Frederick J. Haas.)

Q. It has been brought out in this trial, Mr. Haas, that some of the poor quality hops will move in channels of trade. Do you know where they go?

A. No, I don't, but the fact remains that they do move in channels of trade because of someone else, somebody else buying them, because they are gotten rid of some way.

Q. Do they move, to your knowledge, at the full market price for prime-quality hops?

A. I doubt that.

Q. Do you know whether or not there has been any export of such poor quality 1947 Oregon crop hops?

A. Yes. In fact, we exported some few poor quality 1947 crop ourselves.

Q. Why do you export them rather than keep them for domestic use, for the domestic market?

A. I can tell you the reason for that. A great many of the export people are very particular, but some are not too particular. Some are always willing to buy at a lower price.

Q. Then the poorer quality hops are not moved at the higher prices, is that right? [427]

A. They certainly do not.

Mr. Kerr: That is all.

Cross-Examination

By Mr. Dougherty:

Q. Were you in Oregon in August, 1947, at one time?

A. I was, I think, in and out at least once and possibly more than once.

(Testimony of Frederick J. Haas.)

Q. Did you look at your corporation's yards in Oregon at that time? A. Yes, we did.

Q. Was there any mildew in them at all?

A. There was some, yes.

Q. Is Mitoma one of your yards?

A. That is correct.

Q. Would you say 10-per cent picking was a cleanly picked hop? A. 10 per cent?

Q. Yes. A. That is only fair.

Q. Did you handle any of your own hops from your own yards that showed 10-per cent picking in 1947?

A. I honestly do not recall the picking standards of our own hops, but I can hardly believe they were as high as 10 per cent.

Q. In order to refresh your memory on it, I might invite your attention to Lot 250 of 186 bales of clusters from the Mitoma [428] farm, showing a picking of 10 per cent.

Mr. Kerr: Is that my copy?

Mr. Dougherty: It is shown in the copy that I have here.

Mr. Kerr: What is the page?

Mr. Dougherty: Page 2 or, rather, it is the second sheet, Pages 4 and 5.

Q. Were those hops disposed of to breweries?

A. I imagine they were. I don't know exactly, but they certainly were disposed of; certainly.

Q. Those hops showed some mildew, did they?

A. I distinctly recall the instructions that Mr.

(Testimony of Frederick J. Haas.)

Ray and I gave to our manager that he was to very carefully screen the picking at the Mitoma ranch. In other words, he was to leave everything that was red and he should very carefully screen out only the green stuff, and that of course accounted for the very low yield per acre that we had that year, and I distinctly remember about the Mitoma farm that we did not have as much downy mildew as many others.

Q. But they did show some downy mildew?

A. Very little.

Q. Are you acquainted with the Riverside Farm?

A. Yes, I am.

Q. Who operates it? A. Mr. Ray.

Q. Would you consider 12-per cent hops cleanly picked hops? [429]

A. Not too clean, no.

Q. With reference to the same exhibit, on the third sheet, Pages 6 and 7, I would like to invite your attention to the top of that page and ask you whether or not that shows that some 12-per cent picking from the Riverside Farm was disposed of to brewers?

A. I am not positive. Of course, there were plenty of Riverside hops accepted. There were also a number of Riverside hops rejected.

Q. Following the fourth line where it shows 12-per cent picking on a lot of 99 bales—follow that line across, please.

A. The fourth line, you say?

Q. The fourth line, 12-per cent picking.

(Testimony of Frederick J. Haas.)

A. 99. Yes, I have got it.

Q. Does that indicate that those dirty picked hops were disposed of to a domestic brewery?

A. Definitely.

Q. Was there any mildew on the Riverside Farm in 1947?

A. There was some, yes.

Q. As a matter of fact, do I understand correctly that some of it was so bad you never were able to dispose of it?

A. They were never accepted.

Q. Never accepted?

A. No. In other words, we rejected them.

Q. Turn to the last page of that exhibit, Mr. Haas, the last entry. [430] Does that indicate that in May, 1948, you purchased hops from the Riverside Farm which showed 11- and 12-per cent picking?

A. That is correct; it does.

Q. Does that indicate that those hops went to a domestic brewery?

A. Yes, they did.

Q. I believe you said the standards were set by the brewing trade. Do you sell to breweries on a printed contract similar to these growers' hop contracts?

A. Yes. Well, it is not similar. It is a grower's contract each year—I mean a contract between the dealer and the brewery which specifies the quantity and price, and certain quality specifications.

Q. What are those quality specifications?

A. The quality specifications to the breweries

(Testimony of Frederick J. Haas.)

are generally classified as "choice," "fancy" or "standard." We generally specify in all our contracts either "choice" or "fancy," and through trade custom the term "choice" seems to embody all of these features that are written into the growers' contracts.

Q. Is there any recognized standard, for example, governmental standard, or definition of the term "choice"?

A. I don't believe so.

Q. Do your sales contracts further contain a lengthy definition of "choice" brewing hop similar to the definition in the growers' hop contracts?

A. No. They do have a reference that they shall be free from disease.

Q. As I understand it, most of your sales to breweries are on the basis of samples?

A. A great many, and some are not; but the brewery of course always reserves the right to reject hops if they are not according to the quality specifications of the contract, which are generally embodied in the term "choice" or "fancy."

Q. But if the sale is on sample, the only guarantee is that they will run according to sample?

A. Subject to approval of the sample, yes. I might add that brewers are getting much more particular.

Q. Mr. Haas, I believe you used the term "choice." A. Yes.

Q. Do I understand most of your growers' contracts are so-called prime-quality contracts?

(Testimony of Frederick J. Haas.)

A. Well, prime quality, you mean——

Q. Yes, prime quality.

A. No, I don't think the term is used by any contract—prime quality? If it is, I don't recall it.

Q. Quoting from the contract: "The said hops shall be of prime quality——"

A. Well, it is used. I am sorry. I had forgotten.

Q. Then, do I understand that hops which are purchased under the label "prime quality" are resold under the label of "choice [432] quality"? Is that correct?

A. Apparently the brewer considers those standards choice. In other words——

Q. Do I understand that "choice" hops are the best type of hops that you sell?

A. Well, I think the quality specifications designated as "fancy" are probably a little better.

Q. The figures which you gave us, Mr. Haas, concerning rejected and accepted hops, do they relate entirely to Oregon?

A. No, they do not because we were unable to buy sufficient quantities in Oregon because we did not have the proper quality available. That is, I am referring now to the 1947 crop, the purchase figures stated, accepted in Oregon on contract, which naturally referred only to Oregon.

Q. But the so-called replacement of 1,265 bales——

A. That is right.

Q. ——that includes all your purchases for that period of time?

(Testimony of Frederick J. Haas.)

A. For those two months, that is correct.

Q. Both inside and outside of Oregon?

A. That is correct.

Q. The accepted figure of 4,886 bales at 80 to 90 cents—How many bales did you accept at a lower price?

A. I do not have that figure here.

Q. Would you say it was a considerable number of bales? [433]

A. I would say offhand—possibly Mr. Ray has that figure in his head, but I would say offhand it was considerably less than that.

Q. Would you say that figure would be in hundreds or possibly a couple of thousand or something like that?

A. Probably a few thousand; oh, yes, several thousand.

Q. With reference to the letter which Counsel produced this morning, do you still have that?

A. I think I have it right here, yes.

Q. What is the date of that letter?

A. September 16, 1947.

Q. September 16? A. Yes.

Q. Do I understand that your two requirements in that letter were to have the hops inspected for picking and also to send a line of samples, is that correct?

A. That is correct, to inspect them for picking and for mildew damage.

Q. What do you consider to be a line of samples?

(Testimony of Frederick J. Haas.)

A. Well, tenth-bale samples is the accepted practice.

Q. Doesn't that term "line of samples" refer to so-called type *type* samples?

A. No, I don't believe so. The type sample, according to our understanding, always is possibly two samples out of a big lot, but a line of samples is a full, representative line. [434]

Q. Do I understand you cannot properly pass on a large lot of hops just from one or two type samples?

A. It is certainly very difficult.

Q. Does that letter say anything at all about weighing-in not constituting an acceptance?

A. What do you mean? Wait a moment. I will look and see. I do not believe this letter does, but I believe that was instructed to Mr. Ray in other correspondence and telegrams.

Q. You mentioned, I believe, Mr. Haas, Mr. Ray had been instructed about weighing-in not being an acceptance. Is this telegram, Exhibit No. 5, the telegram to which you are referring?

A. That is certainly one of them. There might be others, but this certainly covers part of that.

Q. That is the telegram of September 25th?

A. That is what it is dated, yes.

Q. I would like to ask you now about your understanding of those instructions. Suppose a grower had not agreed to this, would Mr. Ray have been

(Testimony of Frederick J. Haas.)

authorized to go ahead and accept his hops any way?

A. No, I would say not.

Q. Suppose the grower had not agreed to that, would Mr. Ray have been authorized to go ahead and inspect the hops and weigh them in?

A. Well, on the understanding that the grower—with the understanding with the grower, I mean, that the weighing-in did [435] not constitute acceptance.

Q. Suppose the grower had refused to so understand?

A. I don't know what would have happened then. It was supposed to have been understood—always made clear to the grower; supposed that these instructions were imparted to the grower in each case.

Q. Yes. You consider these to be instructions to the grower rather than an agreement with him?

A. No. Well, it depends on how you interpret the word "instruction." The instructions were to Mr. Ray's office and from there on the arrangements were with him and the grower.

Q. Suppose the grower had declined to enter into such an arrangement?

A. I think it would have been very unreasonable of him to decline to do so, because you cannot inspect a lot by simply having one or two type samples and, while in past years there were certain allowances made then and things were handled a little

(Testimony of Frederick J. Haas.)

bit on an easier basis, however, when, as everyone notice, in 1947 the entire Oregon crop was in peril—that is, the late cluster varieties—it was certainly reasonable that a full line of inspection samples be submitted before anyone was even expected to buy those hops for his hop trade.

Q. This was a change from the practice in prior years, is that correct?

A. To some extent, yes; and then, of course, also you had [436] another feature entering into it. Up until 1947 there was no such thing, except in rare cases, as a question of premium or penalty on hop picking. Unless you had a full line of inspection samples, which the Federal inspection service takes themselves, you are unable to determine what the pick is of a particular lot. You can't determine that from one or two samples.

Q. Let us assume, however, a grower would be so unreasonable as not to agree to this arrangement, then what should Mr. Ray have done?

A. I don't know. Of course, that did not arise.

Q. Would he have been authorized to inspect and weigh in the hops anyway?

A. Well, he certainly would not.

Q. With reference to Exhibit 3-U, do you recognize Mr. Rauber's signature?

A. Yes, sir; I do.

Q. Who is Mr. Rauber?

A. Mr. Rauber is vice-president and secretary of the corporation.

(Testimony of Frederick J. Haas.)

Q. In that letter he assigns, apparently, as one of the grounds for rejecting Mr. Wellman's clusters the fact that there are grain restrictions on breweries. What does that refer to?

A. May I read that?

Q. Please do.

A. Well, I think I know what this means. As you probably recall, during 1947 the brewing industry was still working on a grain-restriction [437] program, which was an aftermath of the war, and, as a consequence, they just were not able to sell as much beer as they had a demand for and, consequently, they had to be more particular on the quality of their materials. Naturally, if they had a tremendous supply on their hands and they could fill the orders, they would be willing to relax possibly some of their quality standards, which I suppose goes on in almost any industry from time to time, but when they were so closely curtailed and their sales were limited they naturally wanted only the best and insisted on sticking absolutely to the letter of the law as far as contract specifications were concerned. I think that is what Mr. Rauber refers to in this letter.

Q. I understand in 1947 you disposed of mildewed hops of 11, 12, 13 and 14 per cent pick to breweries?

A. I don't believe that we did.

Q. Haven't you noticed here where some of the Mitoma and Riverside pickings were that high?

(Testimony of Frederick J. Haas.)

A. Well——

Mr. Kerr: I do not think he said they were mildewed hops. I don't recall that.

Q. (By Mr. Dougherty): Did those hops contain any mildew? A. The Mitoma hops?

Q. Yes.

A. Very little. As I explained, I think they were hand-picked, but it is only natural you are going to have a bale or two [428] with mildew, but they were absolutely hand-screened, the Mitoma hops.

Q. How did it happen, Mr. Haas, that the picking was so high, if they were so carefully picked?

A. They were 10 per cent—I don't know. I don't know.

Q. Did the Riverside hops have any mildew?

A. They had some, but, as I say, we rejected a good portion of the Riverside hops because of mildew damage.

Q. Those hops that ran 10 or 12 per cent that you disposed of to breweries, is it your understanding brewers' standards are less rigid than those of any other?

A. You can't base it on the basis of grain restrictions only, but I do think if they have an enormous demand the natural tendency is to relax their standards, which is also reflected in the quality of the beer.

Mr. Dougherty: Thank you, Mr. Haas.

(Testimony of Frederick J. Haas.)

Redirect Examination

By Mr. Kerr:

Q. Has your firm noted any reluctance on the part of brewery customers to accept diseased hops?

A. I should say so.

Q. What has been the general reaction of your customers to hops diseased by mildew?

A. They just won't take them. They just turn the samples [439] down when we send them to them.

Q. Was there any scarcity of Oregon mildew-free hops produced in 1947?

A. There certainly was.

Q. And what was the effect of that scarcity of mildew-free hops upon the willingness of buyers to relax picking standards?

A. Well, that was obvious, because if you had a combination of both, that is, poor picking and mildew damage, you had two strikes on you, so to speak, whereas if only one of those factors was present, naturally, you had a fifty per cent better chance to induce a brewery to take them. If they were present in combination, they were more or less hopeless.

Q. Which defect did the brewers consider more serious, the diseased condition of the hop by reason of mildew or the dirty picking?

A. I just would not care to answer that, Mr. Kerr. I don't know.

Q. You don't know which they consider more serious?

(Testimony of Frederick J. Haas.)

A. Oh, the more serious? I would say possibly the mildew damage, but I wouldn't care to qualify as an expert. I would rather have the brewery speak for themselves.

Q. Do you know whether or not some breweries employ machinery or make tests as to the leaf and stem content of the hop?

A. They do, definitely. I know that.

Q. You referred to purchases made by John I. Haas, Inc. in [440] 1947 to replace hops which had been or were to be rejected. Did you read the particular purchases and prices you referred to?

A. I think only in total.

Q. Will you read the purchases you referred to in toto, the purchases of 1947 cluster hops, to replace the hops that were being rejected?

A. You want me to read this?

Q. If you will, please.

Mr. Kester: You have a memorandum there. Why don't you put it in?

Mr. Kerr: You may put it in, if you like.

A. I would have to explain these. 174 bales in California—You want me to read the prices, too?

Q. If you would, please.

A. 174 bales in California, at 80; 16 bales in Oregon, at 85; 90 bales Yakima hops, 80; 99 bales, Oregon hops, 85; 116 bales Oregon hops, 85; 140 bales California hops, 86; 30 bales California hops, 85; and 600 bales Oregon hops, 85.

Q. Were those cluster hops?

(Testimony of Frederick J. Haas.)

A. They were all Oregon clusters.

Q. The California hops——

A. They were all clusters—they are all clusters, as you know, in California, and Yakima, too.

Q. In reference to the hypothetical question which counsel [441] propounded to you in which you were asked to assume that the weighing in of a grower's hops would not be an acceptance—under that situation, if Mr. Ray had reported to you to that effect would you have been willing or would your firm have been willing to authorize Mr. Ray to take tenth-bale samples of the hops, if agreeable to the grower, but not to weigh them?

A. Yes. Yes, I think we would.

Q. If the grower would have permitted you to take tenth-bale samples without that being an acceptance, do you think your firm would have been agreeable to that, without going ahead and weighing them?

A. Will you state that again, please?

Q. In other words, if the grower had agreed that you could take tenth-bale samples——

A. Yes.

Q. ——without that sampling being an acceptance——

A. Yes.

Q. ——then, you think you would have authorized Mr. Ray to take those tenth-bale samples but to defer the weighing, if that right?

A. That is right.

Mr. Kerr: That is all. [442]

(Testimony of Frederick J. Haas.)

Recross-Examination

By Mr. Dougherty:

Q. Isn't it the common practice of your firm to take type samples of a grower's hops?

A. Oh, yes.

Q. Do growers ordinarily limit you to the number of those?

A. I don't believe so, but I believe there are generally only one or two taken, just to give you an indication of the quality, because if you don't take one or two you might as well take the regular line.

I might add something, that we have changed that and we are currently, as for example this past season in Yakima where they had as you know wind damage there to hops—we stamp on all of our weight sheets that it does not constitute acceptance of the hops; in cases where we don't stamp that on, we just make it clear to the grower.

Q. That was a change incorporated in 1948?

A. Yes, because of the fact that is the first time they ever had any red hops in Yakima, whereas in Oregon the first time that happened was in 1947, within our memory.

Q. Is there anything which limits John I. Haas, Inc. to taking only one or two type samples?

A. I don't believe so. I will tell you—Mr. Ray's inspection department would know more about that than I would.

Q. Would it be true to say that, so far as you know, there is [443] no reason why type samples

(Testimony of Frederick J. Haas.)

cannot be taken from every tenth-bale? Would that be correct?

A. Type samples? Well, they are not known as type samples any more, then. They are known as inspection samples.

Mr. Dougherty: Yes.

Redirect Examination

By Mr. Kerr:

Q. Isn't it a fact that type samples usually are taken even before the hops have been baled?

A. Very often.

Mr. Kerr. That is all.

(Witness excused.)

Mr. Kerr. I believe that is all, your Honor. I might say we appreciate the opportunity of putting Mr. Haas on now, and we appreciate the courtesy of counsel in agreeing to it.

(Testimony closed.) [444]

[Title of District Court and Cause.]

REPORTERS' CERTIFICATE

We, Ira G. Holcomb and John S. Beckwith, Official Reporters of the above-entitled court, do hereby certify that on, to wit, January 28, January 29, February 1, February 2, February 3 and February 5, 1949, we reported in shorthand the testimony and proceedings upon the trial of the above-entitled

matter; that we thereafter caused our shorthand notes to be reduced to typewriting under our direction; and that the foregoing transcript, consisting of pages numbered 1 to 444, inclusive, constitutes a true, full and accurate transcript of said proceedings so taken by us in shorthand on said dates, and of the whole thereof.

Dated at Portland, Oregon this 15th day of November, A.D., 1949.

/s/ JOHN S. BECKWITH,
Official Reporter.

/s/ IRA G. HOLCOMB,
Official Reporter. [445]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint, Defendant's motion for more definite statement, Amended answer, Memorandum of decision—Judge McColloch, Findings of fact and conclusions of law, Judgment, Notice of appeal, Supersedeas bond, Order extending time for filing record on appeal and docketing appeal, Statement of points on which defendant intends to rely on appeal, Designation of contents of record on appeal,

Order for transmittal of exhibits, Appellee's designation of additional contents of record on appeal, Order extending time for filing record on appeal and docketing appeal, Transcript of docket entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 4158, O. L. Wellman vs. John I. Haas, Inc., in which John I. Haas, Inc. is appellant and O. L. Wellman is appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith duplicate transcript of proceedings, January 28, 29, 1949 and February 1, 2, 3, 5, 1949, filed in this office in this cause, together with exhibits 1, 1a, 2, 3a, 3b, 3c, 3d, 3e, 3f, 3g, 3h, 3i, 3j, 3k, 3l, 3m, 3n, 3o, 3p, 3q, 3r, 3s, 3t, 3u, 3v, 3w, 3x, 3y, 3z, 4 to 10, 12 to 18.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 17th day of December, 1949.

LOWELL MUNDORFF,

Clerk.

[Seal] By /s/ F. L. BUCK,
Chief Deputy.

[Endorsed]: No. 12442. United States Court of Appeals for the Ninth Circuit. John I. Haas, Inc., a corporation, Appellant, vs. O. L. Wellman, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed December 28, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit
No. 12442

JOHN I. HAAS, INC., a corporation,
Appellant,

vs.

O. L. WELLMAN,
Appellee.

DESIGNATION OF THE PORTIONS OF THE
RECORD WHICH APPELLANT THINKS
NECESSARY FOR CONSIDERATION OF
POINTS TO BE RELIED UPON

The appellant, John I. Haas, Inc., hereby designates for inclusion in the printed record on appeal the following portions of the record, proceedings, and evidence:

1. Complaint. (Transcript, Document No. 1.)

2. Amended answer. (Transcript, Document No. 3.)

3. Findings of fact and conclusions of law. (Transcript, Document No. 5.)

4. Memorandum of decision. (Transcript, Document No. 4.)

5. Judgment. (Transcript, Document No. 6.)

6. Notice of appeal. (Transcript, Document No. 7.)

7. Supersedeas bond. (Transcript, Document No. 8.)

8. Order extending time for filing record on appeal and docketing appeal, entered November 18, 1949. (Transcript, Document No. 9.)

9. Statement of points on which defendant intends to rely on appeal. (Transcript, Document No. 10.)

10. Designation of contents of record on appeal, filed with the Clerk of the United States District Court for the District of Oregon. (Transcript, Document No. 11.)

11. Complete typewritten transcript of the proceedings and testimony before the court at the trial of this case. (Transcript, Document No. .)

12. Order for transmittal of exhibits. (Transcript, Document No. 12.)

13. Order extending time for filing record on appeal and docketing appeal. (Transcript, Document No. 14.)

14. Transcript of docket entries. (Transcript, Document No. 15.)

15. Clerk's certificate of transcript. (Transcript, Document No. 16.)

16. This designation of the portions of the record which appellant thinks necessary for consideration of points to be relied upon.

17. The following exhibits:

(The following designation of exhibits is to be disregarded if an order is entered by the court pursuant to the stipulation filed contemporaneously herewith.)

(a) Plaintiff's exhibits having the following numbers: 1, 1-A, 2, 3-A, 3-B, 3-C, 3-D, 3-E, 3-F, 3-G, 3-H, 3-I, 3-J, 3-K, 3-L, 3-M, 3-N, 3-O, 3-P, 3-Q, 3-R, 3-S, 3-T, 3-U, 3-V, 3-W, 3-Y, 4, 5, 6, 7, 8, 9, 10, 16.

(b) Defendant's exhibits having the following numbers: 12, 13, 14, 15, 18.

18. Stipulation with respect to printing of exhibits.

19. Order which may be entered pursuant to such stipulation.

Dated this 21st day of December, 1949.

KERR & HILL,

/s/ ROBERT M. KERR,

/s/ STUART W. HILL,

Attorneys for Appellant.

State of Oregon,
County of Multnomah—ss.

I hereby certify that I have prepared the foregoing copy of Designation of the Portions of the Record which Appellant Thinks Necessary for Consideration of Points to Be Relied Upon, and have carefully compared the same with the original thereof; and that it is a true and correct copy therefrom and of the whole thereof.

Dated December 21, 1949.

STUART W. HILL,
Of Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed Dec. 28, 1949.

[Title of Court of Appeals and Cause.]

CONCISE STATEMENT OF THE POINTS ON
WHICH APPELLANT INTENDS TO
RELY ON APPEAL

The appellant hereby adopts the statement of points upon which it intends to rely on appeal, which was filed with the Clerk of the United States District Court for the District of Oregon. (Transcript, Document No. 10.)

Dated this 21st day of December, 1949.

KERR & HILL,
/s/ ROBERT M. KERR,
/s/ STUART W. HILL,
Attorneys for Appellant.

State of Oregon,
County of Multnomah—ss.

I hereby certify that I have prepared the foregoing copy of Concise Statement of the Points on Which Appellant Intends to Rely on Appeal and have carefully compared the same with the original thereof; and that it is a true and correct copy therefrom and of the whole thereof.

Dated December 21, 1949.

STUART W. HILL,
Of Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed Dec. 28, 1949.

[Title of Court of Appeals and Cause.]

STIPULATION WITH RESPECT
TO PRINTING OF EXHIBITS

Whereas, there are in this cause a substantial number of documentary exhibits (including letters, telegrams, and other records) which would be very expensive to print or otherwise reproduce; and,

Whereas, the appeal involves factual issues, and each party on brief and in argument will wish to refer to certain of said documentary exhibits;

It Is Hereby Stipulated, subject to the approval of the court, that an order may be entered on this appeal permitting all of said documentary exhibits

to be considered by the court in their original form without the necessity of printing or otherwise reproducing the same.

The exhibits to which this stipulation refers have the following numbers:

(a) Plaintiff's exhibits: 1, 1-A, 2, 3-A, 3-B, 3-C, 3-D, 3-E, 3-F, 3-G, 3-H, 3-I, 3-J, 3-K, 3-L, 3-M, 3-N, 3-O, 3-P, 3-Q, 3-R, 3-S, 3-T, 3-U, 3-V, 3-W, 3-X, 3-Y, 3-Z, 4, 5, 6, 7, 8, 9, 10, 16, 17.

(b) Defendant's exhibits: 12, 13, 14, 15, 18.

Dated this 21st day of December, 1949.

/s/ STUART W. HILL,

Of Attorneys for Appellant.

/s/ WILLIAM E. DOUGHERTY,

Of Attorneys for Appellee.

So Ordered:

WILLIAM DENMAN,

Chief Judge.

/s/ WILLIAM HEALY,

/s/ HOMER BONE,

United States Circuit Judge.

[Endorsed]: Filed Dec. 30, 1949.

[Title of Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF ADDITIONAL PARTS OF THE RECORD CONSIDERED MATERIAL ON THE APPEAL

The appellee, O. L. Wellman, having been served

with appellant's designation of certain portions of the record, hereby designates the following additional parts of the record which appellee thinks material to the consideration of the appeal:

1. Appellee's designation of additional contents of record on appeal. (Transcript, Document No. 13.)

2. Plaintiff's Exhibits 3-X, 3-Z and 17. (The printing of exhibits is subject, however, to such order as the Court may enter in connection with the stipulation, heretofore filed, relating to the consideration of the exhibits in their original form.)

3. The proceedings and evidence (including the transcript of testimony and the exhibits) contained in the records now before this Court on appeal from the judgments of the United States District Court for the District of Oregon in the cases of *Hugo V. Loewi, Inc., Appellant, vs. Fred Geschwill, Appellee*, No. 12440, and *Hugo V. Loewi, Appellant, vs. Kilian W. Smith, Appellee*, No. 12441, which two civil actions were tried in the District Court jointly with this action. (The printing in this case of the records in those cases is subject, however, to such order as the Court may enter with respect to appellee's motion referred to in the next paragraph below.)

4. Appellee's motion for consolidation of the record in this case with the records on appeal in the two cases named in the preceding paragraph, which motion is filed contemporaneously herewith.

5. Such order as the Court may enter with respect to appellee's motion referred to in paragraph 4 above.

6. This designation of additional parts of the record considered material on appeal.

Dated this 30th day of December, 1949.

/s/ ROY SHIELDS,
/s/ RANDALL B. KESTER,
/s/ WILLIAM E. DOUGHERTY,
MAGUIRE, SHIELDS,
MORRISON & BAILEY,
Attorneys for Appellee.

Receipt of copy acknowledged.

[Endorsed]: Filed Jan. 3, 1950.

[Title of Court of Appeals and Cause.]

MOTION FOR CONSOLIDATION
OF RECORDS

Now comes the appellee, O. L. Wellman, and moves the Court to consolidate, for the purposes of this appeal, the record in this case with the records now before the Court in the contemporaneously appealed cases of Hugo V. Loewi, Inc.; Appellant, vs. Fred Geschwill, Appellee, No. 12440, and Hugo V. Loewi, Inc., Appellant, vs. Kilian W. Smith, Appellee, No. 12441, to the extent that (a) the evidence, exhibits and proceedings contained

in the records on appeal in said other two cases may be considered as a part of the record in this case, and (b) any part of the evidence, exhibits or proceedings which may be printed in said other two cases may be considered in this case without the necessity of printing the same again for this case.

In support of the foregoing motion the appellee respectfully shows the Court:

1. All three cases are civil actions which involve common questions of law and fact.

2. The three cases were tried jointly in the District Court. There is one combined record for all three cases to this extent: The parties consented and the District Court ordered that the evidence in any of the three actions should be deemed to have been taken and heard and should be considered in each of the actions so tried together insofar as such evidence was pertinent, material and relevant.

3. Appellant's designations of record in the three cases undertook to divide such combined record into three distinct and separate parts. By appellee's cross-designations the part of the combined record below contained in each of the records on appeal has been included in the record on appeal in the other cases. It would, however, be very expensive, and we think unnecessary, to print again in this case the portions of the combined record which will be printed and will be before the Court in said other two cases.

4. Appellant's statement filed herein indicates that twenty-nine of the fifty-one points upon which appellant intends to rely (being Points 1 through 29) relate to the District Court's findings of fact. In order to meet appellant's contentions on such factual issues in this case it will be necessary for appellee to refer in part to evidence which is material and relevant to this case, and which appears in the combined record, but which under appellant's designation would be printed or otherwise available for consideration only by reference to the record in another of said cases.

5. Appellant's statement filed herein indicates that eight of the points upon which appellant intends to rely (being Points 44 through 51) relate to asserted errors in admitting evidence during the trial in the above-mentioned case of Hugo V. Loewi, Inc., Appellant vs. Fred Geschwill, Appellee. In order to permit consideration of such issues, appellee deems it necessary to have the record in that case before the Court in this case.

6. The Federal Rules of Civil Procedure, whenever applicable, have been adopted as part of the Rules of this Court with respect to appeals in actions, such as these, of a civil nature. Rule 42(a) of the Federal Rules of Civil Procedure provides:

“(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it

may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.”

It is submitted that the foregoing rule is applicable here, and that the granting of appellee’s motion together with the like motions filed in said other two cases would, within the intent and purpose of that rule, facilitate the Court’s consideration of each of the three cases, and also avoid unnecessary costs.

The foregoing statements of fact are based upon the records before the Court, and are also verified by the affidavit appended hereto.

Subject to the approval of the Court, the appellee submits the foregoing motion without oral argument, unless a hearing be requested by the appellant.

Respectfully submitted,

/s/ ROY SHIELDS,

/s/ RANDALL B. KESTER,

/s/ WILLIAM B. DOUGHERTY,

MAGUIRE, SHIELDS,

MORRISON & BAILEY,

Attorneys for Appellee.

AFFIDAVIT

State of Oregon,
County of Multnomah—ss.

I, William E. Dougherty, being first duly sworn, do depose and say that I am one of the attorneys of record for appellee in the within-entitled case, that I have knowledge of the facts, and that the statements made in support of the foregoing motion are true as I verily believe.

/s/ WILLIAM E. DOUGHERTY.

Subscribed and sworn to before me this 30th day of December, 1949.

[Seal] /s/ MARIAN HUGGINS,
Notary Public for Oregon.

My Commission expires March 13, 1951.

So Ordered:

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ WILLIAM HEALY,

/s/ HOMER T. BONE,

U.S. Circuit Judges.

Receipt of copy acknowledged.

[Endorsed]: Filed Jan. 4, 1950.

[Title of Court of Appeals and Cause.]

ANSWER TO MOTION FOR CONSOLIDATION
OF RECORDS

Now comes the appellant, John I. Haas, Inc., a corporation, and files this Answer to the Motion for Consolidation of Records heretofore filed on behalf of the appellee. We consent on behalf of the appellant that the evidence, exhibits, and proceedings contained in the records on appeal in said other two cases may be considered as a part of the record in this case, so far as pertinent, and that any part of the evidence, exhibits, or proceedings which may be printed in said other two cases may be considered in this case without the necessity of printing the same again for this case, so far as pertinent.

In support of this Answer, we rely upon the portion of the Transcript of Proceedings in the case of Hugo V. Loewi, Inc., a Corporation, Appellant, v. Fred Geschwill, Appellee, a portion of which is set forth in the Answer to Motion for Consolidation of Records filed in that case contemporaneously herewith.

Respectfully submitted,

KERR & HILL,

/s/ ROBERT M. KERR,

/s/ STUART W. HILL,

Attorneys for Appellant.

State of Oregon,
County of Multnomah—ss.

I, Stuart W. Hill, being first duly sworn, depose and say that I am one of the attorneys of record for appellant in the within-entitled case, that I have knowledge of the facts, and that the statements made in support of the foregoing Answer are true as I verily believe.

/s/ STUART W. HILL.

Subscribed and sworn to before me this 7th day of January, 1950.

[Seal] /s/ GERALDINE RIST,
Notary Public for Oregon.

My Commission Expires May 22, 1953.

State of Oregon,
County of Multnomah—ss.

I hereby certify that I have prepared the foregoing copy of Answer to Motion for Consolidation of Records and have carefully compared the same with the original thereof; and that it is a true and correct copy therefrom and of the whole thereof.

Dated January 7, 1950.

STUART W. HILL,
Of Attorneys for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed Jan. 9, 1950.